Office Supreme Court, U. S.
FILED
SEP 4 192
WM. R. STANSBURY
CLERK

No. 7[redacted]213

In the Supreme Court of the United States

OCTOBER TERM, 1925.

THATCHER MANUFACTURING COMPANY, PETITIONER,
v.
FEDERAL TRADE COMMISSION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

INDEX

	Page
The Facts	3
Question at Issue	4
Grounds for Issuance of Writ	5
Relevant Parts of Clayton Act	8
Powers of a Commission Must be Expressly Granted	9
No Grant of Power in This Case	11
Legislative Purpose of Clayton Act	12
Previous Interpretation by Commission	14

TABLE OF CASES.

American Sugar Refinery v. *Delaware, L. & W. Ry*	10
Brewer v. *Central of Georgia Ry.*	10
Federal Trade Commission v. *Gratz*	12
Interstate Commerce Commission v. *C. N. O. & T. P. Ry.*	9
Interstate Commerce Commission v. *Alabama M. Ry.*	10
So. Pacific Ry. v. *Colorado Fuel & Iron Co.*	10
U. S. & I. C. C. v. *Penn. R. R.*	10
Wilder Mfg. Co. v. *Corn Products Co.*	11

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1925

THATCHER MANUFACTURING COMPANY Petitioner *v.* FEDERAL TRADE COMMISSION Respondent	No. 721.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

The Thatcher Manufacturing Company, a corporation of New York, prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Third Circuit, in the case of the Federal Trade Commission, Petitioner against the Thatcher Manufacturing Company, Respondent.

THE FACTS

1. The chief issue in this matter involves the power of the Federal Trade Commission to make or enforce an order requiring a corporation to divest itself of assets *other than capital stock*. The order was made under Section 11 of the Clayton Act. That Section (omitting irrelevant language) confers upon the Commission only the power;

To require "such person to cease and desist from such violations and divest itself of the stock held * * * in the manner and within the time fixed by said order."

2. In 1920 Thatcher Manufacturing Company had acquired all the assets (plants, equipment, accounts, business, etc.) of three other companies which were then competing in

interstate commerce with Thatcher Company and with each other. These three other companies were shortly thereafter dissolved, and their capital stocks are no longer in existence. The said dissolution took place all prior to January 15, 1921 and prior to the beginning of any action by the Commission against Thatcher Company.

3. In July 1924 the Federal Trade Commission brought suit in the United States Circuit Court of Appeals for the Third Circuit to enforce a certain order issued by said Commission against the Thatcher Company, under said Section 11 of the Clayton Act. Said order directed Thatcher Manufacturing Company to "divest itself of all the *assets, properties, rights and privileges* acquired by it from "the said other three companies, and to "cease and desist from the ownership, operation, management and control of the *assets, properties, rights and privileges* acquired by it from "said other companies."

4. The Circuit Court of Appeals for the Third Circuit affirmed said order. The Court also found that Thatcher Manufacturing Company had acquired the said assets by means of first acquiring the capital stock of said three companies (such acquisition of capital stock as such means or with such result is denied by Thatcher Manufacturing Company, although the acquisition of other assets is admitted).

5. Whatever may be the fact as to such acquisition of capital stock, the said Court entered its decree affirming the said order of the Commission and directing Thatcher Manufacturing Company to divest itself and cease from the ownership of said assets, properties, rights and privileges, acting therein presumably under said Section 11 of the Clayton Act.

QUESTION AT ISSUE

6. The said decision and decree therefore interpret the statutory powers of divesture of said Commission as extending

beyond the subject matter of capital stock and as extending to the further and wholly different subject matter of other assets.

GROUNDS FOR ISSUANCE OF WRIT

7. There is now outstanding a clear divergence and flat contradiction between the United States Circuit Courts of Appeal, for the Third and Seventh Circuits, on the one hand and the Ninth Circuit on the other, as to the above question of law. This divergence relates to the basic powers of an important governmental agency, as follows:

The Circuit Court of Appeals for the Ninth Circuit, in the case of Federal Trade Commission vs. Western Meat Company, involving the same question as to the powers of the Commission over assets, in its opinion rendered early in 1925 on rehearing, has taken a position exactly contrary to that of the Circuit Court of Appeals for the Third Circuit, (herein desired to be renewed), as to this particular power of said Commission over assets other than capital stock.

In said Western Meat Company case the Court held (quoting only the relevant language). "The order (of the Commission) required the petitioner (Western Meat Company) to cease and desist from violating the provisions * * * of Section 7 of the Clayton Act and to divest absolutely of all capital stock of the Nevada Packing Company, so as *to include in such divestment the Nevada Packing Company's plant and all property necessary to the conduct and operation thereof.*" (Italics by this present petitioner.)

The said Court then holds that the Clayton Act "gives the Federal Trade Commission no authority other than the authority to command the offending corporation to desist from holding stock in another corporation in violation of Section 7." * * * "We think the order in the present case goes beyond the authority conferred on the Federal Trade Commission in requiring the petitioner to divest itself of the Nevada Packing Company's plant and all

property necessary to the conduct and operation thereof." * * * The order was accordingly modified.

This Western Meat Company case is now before your Honorable Court on a petition for certiorari which has been granted by your Honorable Court. That petition was made by the Federal Trade Commission itself, seeking the final determination of exactly the same question as is now raised by the Thatcher Manufacturing Company, and above set forth as the basis of this present petition.

8. The Circuit Court of Appeals for the Seventh Circuit, furthermore, and on the other hand, in the case of Swift & Company vs. Federal Trade Commission, decided February 16, 1925, has taken a position on such question exactly the opposite of that taken in the Ninth Circuit as above set forth, and similar to that taken in the Third Circuit (herein desired to be renewed).

The said Swift & Company case is now again before the United States Circuit Court of Appeals for the Seventh Circuit on an application of Swift & Company for rehearing on the same question.

9. These three decisions, in three different Circuits, in the present case of Thatcher Manufacturing Company, in the Western Meat Company, and in Swift & Company cases, establish differing and conflicting rules of law as to the same important subject matter.

As is stated by the Federal Trade Commission in its petition for certiorari in the said Western Meat Company case (p. 9) —"This disagreement between the United States Circuit Courts of Appeals * * * in respect to said sections of the Clayton Act, necessarily entails doubt as to their correct interpretation * *. Manifestly the Commission can have but one rule for the enforcement of the law." The disagreement above referred to by the Commission is, of course, that already alluded to, namely,

between the Third and Seventh Circuits on the one hand, and the Ninth Circuit on the other hand.

The foregoing reasoning of the Commission upon this situation is convincing. It is also the more weighty, because the difficulties of the Commission itself under such diverse interpretation, as stated by the Commission, apply with equal force to those numerous corporations which are subject to this law in the three circuits, as well as the great body of citizens.

10. Furthermore (apart from the conflict of law thus created) the said decision and decree against the Thatcher Manufacturing Company in the Circuit Court of Appeals for the Third Circuit also involves (as do the other two cases referred to) the interpretation and extent of the basic powers of an important governmental agency, the Federal Trade Commission It thus affects the rights and duties of all citizens and residents, corporate and personal, in the United States.

11. Thatcher Manufacturing Company therefore respectfully prays that a writ of certiorari may issue from the Supreme Court to the Circuit Court of Appeals for the Third Circuit, for the bringing of the said case before the Supreme Court for its final determination.

12. The said decree of the Circuit Court of Appeals for the Third Circuit was issued after the last adjournment of the Supreme Court; and inasmuch as the Supreme Court will not again be in session until October , 1925, the said Circuit Court of Appeals has granted a stay upon said decree until October 15, 1925, in order fully to enable the Thatcher Manufacturing Company to prevent this petition of certiorari.

Charles Henry Butler
Attorney for Petitioner
1537 Eye St. N. W.
Washington, D. C.

BRIEF

This case presents a matter of general importance for two reasons;

Because of the flat conflict of interpretation of the Clayton Act between different Circuit Courts of Appeals;

Because the question at issue involves the fundamental powers of an important governmental agency, the Federal Trade Commission, under said Act.

Relevant portions of the Clayton Act are as follows:

Section 7. "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to tend to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

Section 11 (Quoting only the relevant parts thereof). "If up such hearing the commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order."

The Federal Trade Commission has issued an order directing the Thatcher Manufacturing Company, Petitioner herein, to

divest itself of "assets, properties, rights and privileges" (other than capital stock) acquired by said Company from three competing companies. The Court below has issued its decree enforcing such order, (but granting a stay thereof until October 15, 1925, in order to allow of the filing of this petition for certiorari).

It is respectfully submitted that such order as to assets is beyond the statutory powers of the Federal Trade Commission, and, therefore not enforceable by judicial action, for the following reasons;

1. *Powers of a Commission Must be Expressly Granted.*

Any administrative commission or agency exercising as in this case, semi-judicial powers, must show a plain and express basis for such powers within the wording of its enabling statute. Such powers, so granted, have always been construed with considerable strictness. There is no such grant here.

Interstate Commerce Commission v. C. N. O. & T. P. Ry., 167 U. S., 479 (1897). This was an early and basic case as to the powers of the Interstate Commerce Commission. The I. C. C. Act had provided that "All charges, (railway rates) shall be reasonable and just,' and also that "The Commission is hereby authorized to execute and enforce the provisions of this Act."

The Commission, assuming to act thereunder, had made an order condemning certain rates as unreasonable and directing that future rates should conform to a given standard of reasonableness.

Held. Order invalid because beyond the power of the commission.

> "That Congress has transferred such a power to any administrative body is not to be presumed from any doubtful and uncertain language (p. 505)."

In view of the language of the I. C. C. Act above quoted, the attempted extension of the Interstate Commerce Commission's power was much more clearly justified by that language than is the extension of power attempted in the case at issue.

I. C. C. v. Alabama M. Ry., 168 U. S., 144 (1897). This case raised the same question in slightly different form with the same decision, to the effect that as Congress had not given the power expressly, it did not give it indirectly.

U. S. and I. C. C. v. Penn. R. R. 242 U. S., 208 (1916). The law at that time defined "transportation" as including cars and "all instrumentalities * * * of shipment or carriage" and stated that "it shall be the duty of every carrier * * * to provide and furnish such transportation upon reasonable request thereof * * * and the Commission is hereby authorized and required to execute and enforce the provisions of this Act."

Held that this could not be construed as requiring the carrier to furnish a specific form of car like tank cars.

Brewer v. Central of Georgia Ry., 84 Fed., 258 (1898).

> "The courts and commissions of the United States must look to what is expressed or necessarily implied by the law for their authority to decide issues (p. 261.)"

So. Pac. Ry. v. Colorado F. & I. Co., 101 Fed., 779 (1900). Order by Interstate Commerce Commission fixing a freight rate.

Held invalid as beyond the power of the commission.

> "But that power, it seems, has not been conferred and the courts cannot enlarge the authority of the commission by enforcing orders of that body which it has no power to make."

Amer. Sugar Ref. Co. v. D. L. & W. R. R. 207 Fed., 733 (1913). This was the case of an informal instruction as to rates issued by the I. C. C. but not complying with the procedure required by statute.

Held unenforceable.

> "Acts of the commission, in exercise of its administrative functions, must, in order to be effective, strictly conform to those provisions and requirements of the Act by which its authority is prescribed and defined."

The order in this case must necessarily be based only upon the powers contained within the statute on which the original case was initiated.

Wilder Mfg. Co. v. Corn Products Co., 236 U. S., 165 (1914).

> "Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes (p. 174)."

2. *There is No Express Grant of Such Power.*

There is nothing in the enabling act (Section 11 of the Clayton Act, above quoted) of the Federal Trade Commission to justify that body in making or enforcing any order relating to assets other than stock. That Section gives power only to require "such person to cease from such violations and divest itself of stock."

There can be but one meaning in such language.

"Divesting of Stock" is divesting of "Stock." It is not divesting of assets, lands, tangible property, etc.

"Violations" means violation of Section 7 of the Act. That section can be violated in but one way, namely, by (a) acquiring stock with (b) certain forbidden effects, restraint of trade, etc. Both factors combine to make the offense. Mere acquisition of assets alone, mere restraint of trade, etc. — none of these of themselves violate the Clayton Act. They may be an offense under the Sherman Law, but not under the Clayton Act.

Any order of the Commission that is not based on the divesting of stock, goes beyond the Clayton Act and is invalid.

No such power, however desirable or desired, can be read into the plain language of the enabling act of this administrative body. It is not there explicitly, and it cannot be inserted there by implication.

3. *The Legislative Purpose of the Clayton Act.*

The purpose of the Clayton Act was purely preventive. It was expressly and narrowly aimed at stock control which *might* result in restraint. It dealt primarily not with restraint — the effect — but with stock acquisition, the method. It was not meant to duplicate the Sherman Law, which deals with and remedies *results*. It went a step farther back, supplementing the Sherman Law, by dealing with the problem in its incipient stage; namely, the method — stock acquisition.

All this is obvious from its form and historical position, and from the Congressional discussion accompanying its passage.

Mr. Justice Brandeis in his dissenting opinion, Federal Trade Commission *v.* Gratz, 253 U. S., 421 which annulled an order of the commission, stated the theory of the Clayton Act.

> "The proceeding is not punitive. The complaint is not made with the view of subjecting the respondents to any form of punishment. It is not remedial. * * * The proceeding is strictly a preventive measure taken in the interest of the general public (p. 432). * * * Instead of attempting to inflict punishment for having done prohibited acts, instead of enjoining the continuance of prohibited combinations and *compelling disintegration of those formed in violation of law* (Italics ours) the Act undertook to preserve competition through supervisory action of the commission. The potency of accomplished facts had already been demonstrated. The task of the commission was to protect competitive business from further inroads by monopoly. * * * Its action was prophylactic. Its purpose in respect to restraints of trade was *prevention* of diseased business conditions, not cure."

It is respectfully submitted that the action of the Federal Trade Commission throughout this, as in other like cases, illustrates an essential misconception of that legislative purpose.

The Commission falls frequently into an unconscious confusion of the Clayton and Sherman Acts, as though they were substantially duplicates and interchangeably applicable.

The Commission, in its arguments in this case, as well as in its brief for certiorari in the Western Meat Co. case (pages 13 to 18 inclusive) has continually cited decisions under the Sherman Law. In said brief the Commission points out (pages 11 and 12) that the said order may require "such person to cease and desist from such violations" and also may require such person to "divest itself of the stock held" and argues therefrom that the "violations" are something other and different from the control of stock.

The Commission misconceives herein the "violation" in question. The violation in question, as shown by Section 7, consists of two factors; acquisition of stock, and the various forbidden effects which we may generally call restraint. Either of these factors alone is not a violation of Section 7. The "violation" referred to in Section 11 which the Commission is empowered to terminate must therefore be a violation in which, at the time of the order, there existed both the factors as to stock and as to restraint.

It considers that it has presented a case for its action under the Clayton Act, when it shows a status of *restraint* by the acquisition of *property*. It then aims its order at such property. This is pure "Sherman Law theory." It disregards the fact that the offense under the Clayton Act can exist only by the coexistence of *two* factors (a) stock acquisition plus (b) actual or possible resulting restraint. It disregards the fact that the Clayton Act purpose is solely to *prevent* the result by preventing or destroying the *means*, i. e. stock control, and that any order

under that Act must be aimed as Section 11 provides, at divesting of stock.

4. In argument in this case the Commission has laid weight upon the broad and indefinite equitable proposition "that a person can not profit by his own unlawful acts."

This sweeping statment, usually applied in matters of private right between man and man, has no application to the question raised here as to the statutory power of a governmental Commission. Here is not the question of whether a certain corporation shall profit. It is a question of the extent of the power which Congress has conferred. This action is not brought to secure or to retain any profit. It is brought by the Commission to enforce a statutory remedy. The profit or otherwise of the respondent in the case is not in issue.

5. *Previous Interpretation by the Commission.*

On September 8, 1919, Mr. Victor Murdock, member of the Commission, appeared before the Judiciary Committee of the House of Representatives. That Committee was considering an amendment of the Clayton Act intended to confer additional powers upon the Federal Trade Commission. In support of this, Mr. Murdock (p 21 Serial 5 of the hearings) testified as follows:

> "Now in Section 7, Clayton Act, Mr. Chairman, Congress provided against a corporation acquiring the stock in competitive companies. I think at the time Congress passed that Act it was a wise piece of legislation. But Section 7 of the Clayton Act certainly needs strengthening now, because Section 7 does not include the word 'property.' * * * The government can not win where there is an acquisition of property instead of acquisition of stock as the law stands today."

Congress declined so to amend Section 7. The Commission is now attempting to exercise the very power which Congress declined to give them.

Charles Henry Butler.
Attorney for Petitioner
1539 Eye St. N. W.
Washington, D. C.

Office Supreme Court, U. S.
FILED
AUG 19 1926
WM. R. STANSBURY
CLERK

No. 213

In the Supreme Court of the United States

OCTOBER TERM, 1926

THATCHER MANUFACTURING COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

BRIEF OF PETITIONER

HERBERT KNOX SMITH,
Counsel for Petitioner.

THE CASE, LOCKWOOD & BRAINARD CO.
HARTFORD, CONN.

SUBJECT INDEX

	Page
Table of Cases, Books and Statutes Cited	3
Preliminary Statement	5-7
Citation of Opinion of Court Below	7
Grounds for Jurisdiction	7-9
Judgment Below	7
Specific Bases of Jurisdiction	7
Stationary Provision for Jurisdiction	8
Cases Supporting Jurisdiction	8
Statement of the Case	9-19
Initial Transaction — Parties	9
Paying for the stocks	10
Basic Contract	11
Contract in the Alternative	12
Working-out of Contract	13
Baldwin Takes Personal Control	14
Baldwin's Individual Financing	14
Kept Thatcher Company Out	15
Transfer of Assets to Thatcher Co. — Closing Transaction	17
Sterling Glass Company	18
Specification of Errors to be Urged	19
First Issue — Stock Acquisition	19
Second Issue — Power of Commission	19
Summary of Argument	19-22
On First Issue	20
On Second Issue	21
Argument in Full—Part I—Acquisition of Stock	22-38
Acquisition on July 3, 1920 Not Relevant	22
Earlier Acquisition — Real Issue	23
Basic Error of Court Below	24
Does Borrowed Money Belong to Borrower?	26
Whole Transaction a Personal Venture	27

Page

Thatcher Company Paid Price Only Once .. 28
Uncertainty Arising from Basic Error 29
Intent 30
Minor Issues 31
Legal Definition of Acquisition 34
Essential Issue of Acquisition of Stock 35

Part II — Power of Commission 39-54
Stock Acquisition Assumed for Argument .. 39
Order of Commission in Question 40
Clayton Act — Relevant Sections 42
Express Power 43
Implied Power Invoked by Court 44
Limits of Delegated Power 45
Citation of Authorities on Power of Commission 46
Removing Case from Clayton Act 48
Earlier Position of Commission 49
Section 7 Not Nullified 50
Underlying Purpose to Prevent Unfair Methods 50
Congressional Debate 51
Bogus Independents 52

Conclusion 55

TABLE OF CASES, BOOKS AND STATUTES CITED

	Page
Alabama Mid. Ry.; Interstate Com. Commission *v.*	47
Allen; LeFlore County *v.*	35
Allbright *v.* Sussex etc. Commissioners	35
Beale & Wyman; R. R. Rate Regulation	46
Black; Law Dictionary	35
Board of Supervisors; Wulzen *v.*	35
Bouvier; Law Dictionary	34
C. N. O. & Tex. Pac. Ry. *v.* Interstate Com. Commission	48
C. N. O. & Tex. Pac. Ry.; Interstate Com. Commission *v.*	46
Clayton Act	42
Colorado Fuel & I Co.; So. Pac. Ry. *v.*	48
Corn Products Co.; Wilder Mfg. Co. *v.*	45
Corpus Juris	35
Cyclopædia of Law Procedure	35
Interstate Com. Commission *v.* Alabama Mid. Ry.	47
Interstate Com. Commission; C. N. O. & Tex. Pac. Ry. *v.*	48
Interstate Com. Commission *v.* C. N. O. & Tex. Pac. Ry.	46
Interstate Com. Commission *v.* Penn. R. R.	47
LeFlore County *v.* Allen	35
Penn. R. R.; Interstate Com. Commission *v.*	47
So. Pac. Ry. *v.* Colorado Fuel & I Co.	48
Sussex etc. Commissioners; Allbright *v.*	35
Waite; White *v.*	35
White *v.* Waite	35
Wilder Mfg. Co. *v.* Corn Products Co.	45
Wulzen *v.* Board of Supervisors	35

No. 721

In the Supreme Court of the United States

OCTOBER TERM, 1926

THATCHER MANUFACTURING COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

BRIEF OF PETITIONER

PRELIMINARY STATEMENT

This case has *two* issues. One is peculiar to it, and apparently does not arise in the two other cases assigned with it for argument.

That peculiar issue is whether the Petitioner ever did acquire any capital stocks in violation of law.

There is, indeed, also the other issue common to all three cases; namely whether the Federal Trade Commission has any power to order divestiture of assets other than capital stock.

But wholly distinct from this second and common issue, *Thatcher Company denies that it ever illegally acquired any capital stocks or assets.* It asserts that, whatever the decision on the power of the Commission, the transaction complained of, itself, was in no way within the Clayton Act, and no ground ever existed for this action.

The Petitioner asserts that in that transaction the charged acquisition of the stocks in question was a *purely private venture of three men*, and not of Thatcher Company. That all Thatcher Company ever did was, at the end of the whole affair, to take over the plant and business properties of the other companies, as it had a right to do, paying then the full price therefor. That this sale to it was caused wholly by the *individuals* then having complete control of the stocks of those companies. That it took no part in any stock acquisition of competing companies, and is therefore not amenable to the orders of the Commission under the Clayton Act, no matter how those powers may be construed.

THE POSITION OF THE PETITIONER IS CONCISELY AND ACCURATELY STATED IN THE DISSENTING OPINION OF JUDGE BUFFINGTON IN THE COURT BELOW, QUOTED IN FULL AS FOLLOWS:

> " *Buffington, J;* In view of this case involving a far reaching question of jurisdiction, I note my dissent. The original purpose Baldwin " (one of the three men above referred to) " had in view, and which he finally carried out, was the acquisition and absorption of the several corporations involved by the purchase of their entire properties. If, in so doing, he suppressed competition the remedy for such wrong was vested in the courts and not in the trade commission.
>
> " The necessity for the prompt exercise of the options upon such properties, the unlooked for situation created by the withdrawal of his associates and the unloading of the whole financial burden on him together with the complicated stock handlings made necessary in the successful financing of his original plan, gave the matter the appearance, but not the reality of a stock

> acquisition plan; but in my judgment the transaction as a whole, in its original plan, its execution and effect, was an acquisition of property, not of stock, and jurisdiction over it, if amenable to the law, was vested in the Federal Courts and not in the Federal Trade Commission. Such being my view I feel it my duty to respectfully record my dissent."

The Petitioner does not believe, furthermore, that it has violated the Sherman Law. But if it has, it at least has the right to a trial under that law and not under the Clayton Act.

It is the purpose of Petitioner in the argument which follows, to show that Judge Buffington's views, above given, were correct and that this action by the Commission against the Petitioner is an unjustified attempt to extend the functions of the Commission into a field which pertains to the Federal Courts and the Attorney General.

CITATION OF OPINION OF COURT BELOW

The opinion delivered in the Court below (Circuit Court of Appeals for the Third Circuit) is found in Federal Trade Commission *v.* Thatcher Manufacturing Company, 5 Fed. Rep. (2nd Series), 615.

GROUNDS FOR JURISDICTION

1. **Judgment Below** — The original judgment to be reviewed was filed April 16, 1925, (R. 289 to 299). Petitioner's petition for rehearing was denied by judgment filed June 2, 1925 (R. 340). Motion of Respondent for reform of order was denied by judgment filed June 12, 1925 (R. 340).

2. **Specific Bases of Jurisdiction** — (a) That the Court below, contrary to the claim of the Petitioner

there made, held that the Federal Trade Commission had power under the Clayton Act to require the Petitioner to divest itself of assets other than capital stock, and to require other action as to such assets, and directed the enforcing of the order of said Commission to such purpose (R. 298; also Petitioner's Reply, R. 266-269.)

That there has, on the other hand, been a holding upon such power of the Commission directly to the contrary, namely in the case of Federal Trade Commission *v.* Western Meat Company, 4 Fed. R. (2nd Series), 223 by the Circuit Court of Appeals for the Ninth Circuit.

There has thus arisen a conflict of interpretation of the Clayton Act as between different Circuit Courts of Appeals.

(b) That the Court below, contrary to the claim of the Petitioner there made, held that the Petitioner acquired the capital stocks of the Essex Glass Company, Lockport Glass Company, and Travis Glass Company in violation of the Clayton Act (R. 297; Petitioner's Reply, 263-264.)

3. **Statutory Provision for Jurisdiction** — The Clayton Act, under which this case arises, (approved October 15, 1914) provides (Section 11) that " The judgment and decree of the Court " (Circuit Court of Appeals) " shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty-five of the Judicial Code."

On October 26, 1925, the Supreme Court of the United States granted a writ of certiorari in this case (R. 343).

4. **Cases Supporting Jurisdiction** — As the jurisdiction is based upon statute (Section 11 of the Clayton

Act, above quoted) and certiorari has been granted, citation of cases in support of the jurisdiction is believed to be unnecessary.

STATEMENT OF THE CASE

(1) **The Initial Transaction — Parties** — Petitioner, Thatcher Manufacturing Company, is and was at the commencing of this action, a New York corporation, manufacturing and selling milk bottles, with plants and business in various states. The three other companies, whose capital stock Petitioner is charged with acquiring, were the Essex Glass Company, the Lockport Glass Company and the Travis Glass Company, also all manufacturing and selling milk bottles (hereinafter called the " three companies ").

All of these four companies were, at the beginning of the transaction in question, on August 28, 1919, in competition with each other in interstate commerce.

(2) The transaction in question began on August 28, 1919. Three dominating individuals appear on this opening date — MR. EDWARD LIBBEY, President of The Owens Bottle Company, (R. 105; 199), the most powerful glass products company in the country, with assets then of over $20,000,000 — MR. WILLIAM FORD, a business associate and large stockholder in Owens Company (R. 146; 157; 215) — and MR. FRANCIS E. BALDWIN, the President of Thatcher Manufacturing Company, the Petitioner herein (R. 86.) THE PETITIONER CONTENDS THAT THE WHOLE TRANSACTION CONCERNING THE STOCKS, WAS THE INDIVIDUAL BUSINESS VENTURE OF THESE THREE MEN, AND NOT THE VENTURE OF PETITIONER.

These three gentlemen (not Thatcher Company) had acquired personally certain options from a Mr. Axton on the stocks in question of the " three companies " (R. 93). The total purchase price under these

options was $2,110,000 (R. 95). There was also included in this price and in the original purchase, a fourth company, the Woodbury Glass Company. The Woodbury Company, however, no longer appears in this case, as the Court below dismissed it from consideration because its competition was negligible. (R. 298-299).

(3) **Paying for the Stocks** — This purchase price, $2,110,000 — and here, as the Court below held, (R. 295) is really the determining set of facts as to acquisition — was raised as follows. These three gentlemen, for a purpose which will be stated below (pp. 18-19) first organized the Sterling Glass Company. Into the treasury of that company was placed $500,000, half by Mr. Libbey personally and the other half by Thatcher Company. Each took an exact one-half of the stock. (R. 95).

The remaining and by far the greater part (over three quarters) of the purchase price was raised on August 28, 1919 by Messrs. Libbey, Ford and Baldwin on their *individual personal notes*. Mr. Baldwin made to the Guaranty Trust Company of New York his personal promissory demand note for $650,000; Mr. Libbey and Mr. Ford each made a similar demand note for $480,000, making a total of $1,610,000 (R. 36). Each endorsed the notes of the others. Thatcher Company had no connection whatsoever with this loan or with these notes. (R. 198). Nor did Sterling Comany.

(4) This sum, with the $500,000 held by Sterling Company, making a total of $2,110,000 — the option price — was paid by the lender, the Guaranty Trust Company (R. 149), to the original holders of the stocks of the "three companies," (and of the Woodbury Glass Company). No transfer of the said stocks was made at this time on the "three companies'" books, but the

stock certificates were simply endorsed in blank, and delivered to the Guaranty Trust Company as collateral for the said three individual notes. (R. 96; 113).

(5) **The Basic Contract** — As a part of the original transaction on August 28, 1919, Messrs. Libbey, Ford and Baldwin, and the Sterling Glass Company, made a basic contract. (R. 36). Thatcher Company was *not* a party to this contract. This contract described the transaction and provided for certain contingencies. The situation on that opening date was somewhat unusual.

(6) Mr. Libbey had only one interest in this whole affair; he hoped to acquire for his company (The Owens Bottle Company), certain important rival patents owned by the Hartford-Fairmont Company, relating to the manufacture of glass. The " three companies " held exclusive licenses under these patents. (R. 100.) The said basic contract states —

> " Whereas Libbey has entered into this Agreement in contemplation of the purchase by him or for his account of the so-called " Hartford-Fairmont Patents " * * * now owned by Hartford-Fairmont Company or under the control thereof." (R. 36).

(7) When this contract was made, it was uncertain whether these Hartford patents could be secured. (As a matter of fact they never were secured). The three associates therefore had to provide for two future contingencies —

(a) The contingency where the Hartford rights should be secured. In this case, Sterling Company was to be greatly enlarged and become the parent or " permanent " company (R. 223) for the Hartford-Fairmont acquisition and the Essex, Travis, Lock-

port and Woodbury Companies, and also for Thatcher Company itself. (R. 105; 146). Extract from basic contract (R. 36) —

> "Whereas it is the purpose of the parties hereto that at a later date a permanent company be organized to take over the ownership of the *plants and assets* (italics ours) of all of the said companies, together with the Thatcher Manufacturing Company."

(Note that Thatcher Company was not to organize this permanent company. On the contrary, Thatcher Company was to be absorbed by it).

(b) The contingency, on the other hand, of failure to secure the Hartford rights. In this case, Messrs. Libbey and Ford expressly reserved the right to withdraw from the whole transaction and from all liabilities thereunder. (R. 36-37). For this second contingency and the consequent withdrawal of Libbey and Ford, it was necessary to provide, in advance, someone who would then assume all the liabilities that had to be incurred in the purchase of the four companies' stocks. The options on these stocks were expiring in a few days. (R. 223.) It was necessary at once to incur note liabilities, as above stated, of $1,610,000 in order to exercise these options. Upon Libbey and Ford's possible later withdrawal, someone else must be prepared beforehand to assume these obligations.

(8) **Contract in the Alternative** — Therefore, the whole transaction was made in the *alternative*. This "alternative" feature explains much which is otherwise obscure. If the Hartford-Fairmont patents were secured, Mr. Libbey was to remain in control, the others "were following his leadership." (R. 145.) In the contrary event, Mr. Libbey and Mr. Ford might withdraw; and Mr. Baldwin (not Thatcher Company)

agreed thereupon to assume the entire final responsibility of all parties, including Sterling Company, with the right to do as *he* (not Thatcher Company) pleased with the acquisitions made. The contract so provides —

> " In the event of Libbey's retirement as aforesaid, Baldwin agrees to assume all liability hereunder, and all liability upon the said notes or in connection therewith, of each and all of the other parties hereto." (R. 37).

This of course includes Sterling, as it was one of the " other parties." *Baldwin was thus the ultimate guarantor, the ultimate party in interest.* And again in such contingency —

> " Baldwin may proceed with the organization of such permanent company and with the disposition of Sterling Company and its assets, in such manner as Baldwin may see fit, free from all obligations under this agreement." (R. 37).

(9) **The Actual Working-out of the Contract** — So much for the initial plan. It was the second of the two alternatives that actually happened. Shortly before December 1, 1919, it was apparent that the Hartfort patents could not be secured. Therefore, on December 11, 1919, Messrs. Libbey and Ford, acting under the contract, gave Mr. Baldwin (not Thatcher Company, R. 129) written notice of withdrawal. (R. 40; 41; 113.) This brought all the liabilities and rights upon Mr. Baldwin. Evidently he knew what was coming, because he proceeded at once personally to exercise those rights. Between December 5th and 8th, 1919, he caused the stocks of the " three companies " to be transferred on the companies' books from the original holders to *himself and a group of his own business associates,* (not Thatcher Company), (R. 211; 224) the certificates still remaining as collateral. (R. 150.) None

of these associates paid anything for the transfer (R. 116; 151; 154; 163; 208) and were evidently representing Mr. Baldwin. This was all done on his sole order. (R. 150; 154; 211; 224.) No one questioned his right to do this, or his individual control. As Mr. Baldwin feelingly remarked. "They dropped the whole load on my shoulders and I sweat." (R. 110.) Sterling Company, important under the first contingency, now becomes a fifth wheel, and has hereafter no functions or activity.

(10) **Baldwin Takes Full Personal Control** — He thereupon took charge of the operation of the "three companies," (R. 97; 116; 211); had their books brought to his office; caused new boards of directors and officers to be elected, all nominated by himself (R. 116; 142), and exclusively exercised full, personal control, for a period of over five months.

(11) **Baldwin's Individual Financing** — Then, anxiously mindful of the fact that he (not Thatcher Company) was now liable for the purchase note obligations of $1,610,000, he (not Thatcher Company) began a long, earnest campaign to finance his responsibility. (R. 215 to 217.) HE HAD NO GUARANTY OR INDEMNITY FROM THATCHER COMPANY IN THIS, OR ANY RECOURSE TO THATCHER COMPANY. He did not control Thatcher Company. (R. 126.) Mr. Baldwin testified (R. 122) —

> "*Question.* You had no assurance of any sort that the thing would take place that did take place — that the Thatcher Company could finance and take over the assets?"
>
> "*Answer.* No, sir."

Again; (R. 198.)

> "*Question.* At that time or when the August 28, 1919, contract was made, was there any con-

tract, understanding, or relation of any sort between you personally and the Thatcher Manufacturing Company by which the Thatcher Manufacturing Company was in any way bound or could be bound to take up that liability on those notes?"

"*Answer.* No, sir."

Again; (R. 218.)

Mr. Mandeville, Director and General Counsel of Thatcher Company and active in the original transaction, testified;

"*Question.* Mr. Baldwin testified this morning that there was no conference agreement or understanding of any sort which would have allowed him to command the Thatcher Company to take over this liability" (on the notes).

"Is that your understanding?"

"*Answer.* Yes, sir; I talked with some of the directors of the Thatcher Company about it."

(12) **Kept Thatcher Company Out** — In fact, far from relying on Thatcher Company, Mr. Baldwin, pending the success of his financing, expressly, honorably, and deliberately kept Thatcher Company out of the transaction entirely. Mr. Mandeville, testifying as to his own anxiety in this financing, stated (R. 145-146) —

"*Question.* Had you had any assurance or certainty that the Thatcher Company could finance it, would you have had any such anxiety?"

* * * * * * * * * * * *

"*Answer.*

"Mr. Baldwin and I discussed the question of offering these assets of these companies to the

> Thatcher Company, and Mr. Baldwin pointed out that the Thatcher Company's stockholders included many women and people who were dependent upon an income from the Company and that he had always kept the Thatcher Company safe and sound and a reliable investment and that *he could not and would not bring any proposition to the Thatcher Company until it was in a definite form and could be financed and could be presented so as to be advantageous to the Thatcher Company.*" (Italics ours.)

Again Mr. Mandeville testified as to the non-involvement of Thatcher Company (R. 218.)

> "*Answer.* Yes sir; I talked with some of the directors of the Thatcher Company about it."
>
> "*Question.* What was the nature of that discussion?"
>
> "*Answer.* The particular discussion that I have in mind was with Mr. S. G. H. Turner, who * * * represented in the (Thatcher) board the J. S. Fassett interest in the Thatcher Company. He said that *it had been discussed among the directors, and that it was impossible for the Thatcher Company to take over these companies* because it would swamp them if it did." (Italics ours.)

This shows the position, both of Mr. Baldwin, and also of the Directors of Thatcher Company — both concurring. They completely contradict the idea that this was a Thatcher Company venture. Both Baldwin and the Company were against it, till safe financing could be secured.

In April 1920, more than seven months after the original purchase, he secured such banking support. (R. 44.) Subsequent proceedings were simply in con-

summation of this arrangement. In the last weeks of June 1920, in pursuance of votes of the stockholders of the " three companies," (*none of them being Thatcher Company and all of them being Baldwin and his associates*) (R. 17; 64-65; 68-70; 72-75; 132), bills of sale and deeds were drawn conveying all the companies' *assets* to the Thatcher Company.

(13) **Transfer of Assets to Thatcher Company — Closing Transaction** — On July 3, 1920, the entire transaction was closed. The bills of sale and deeds were delivered to Thatcher Company; Thatcher Company then delivered to the bankers a mortgage covering all these assets and the stock of Woodbury Company, (together with all of the property of Thatcher Company itself), to secure a bond issue of $2,000,000. The bankers then supplied the $2,000,000; this paid off the outstanding purchase notes (R. 99); and the notes were surrendered. (R. 139; 154.) As a finish of the entire transaction, the certificates of the stocks of the " three companies," held by the Guaranty Trust Company as collateral for such notes, were also surrendered. They were now of no significance. They certainly were not used by Thatcher Company to secure these assets, BECAUSE ALL THE DEEDS AND BILLS OF SALE WERE MADE AT LEAST A WEEK BEFORE JULY 3, 1920, PURSUANT TO VOTES OF STOCKHOLDERS WHO WERE ALL EITHER BALDWIN OR HIS NOMINEES, AND NOT THATCHER COMPANY. There were on July 3, 1920 neither assets or power behind these certificates. They were, in fact, of so little importance that it is not clear from the evidence what became of them. No one of the actors in the original transaction gave any thought to them. Apparently Mr. Mandeville got them. (R. 99; 139; 154; 208; 226.)

(14) Between October 20, 1920 and January 13, 1921, all of said " three companies " were dissolved, and their stocks ceased to exist. (R. 221.)

(15) **Sterling Glass Company** — This Company was organized at the instance of Messrs. Libbey, Ford and Baldwin five days before the opening of the whole transaction (R. 103; 104.) Thatcher Company and Libbey each took an exact one-half (2500 shares) of its stock, and each paid in $250,000 for such stock. This $500,000 was then paid over by Sterling Company on August 28, 1919, as part (less than one-quarter) of the purchase price of the " three companies " stocks, (including also Woodbury Company). Ten months later, on June 4th or 5th, 1920 Thatcher Company bought out Libbey's holdings in Sterling Company for par value ($250,000) and interest, and took record title to his stock.

The opinion of the Court below (R. 292, end of page) mistakenly implies that this was done immediately upon Libbey and Ford's withdrawal. As a matter of fact it was done six months later, under much changed circumstances and only after Baldwin had provided safe financing, based on a purchase of plant assets by Thatcher Company, a very different situation. (R. 162).

Sterling Company was a party with Libbey, Ford and Baldwin to the basic contract of August 28, 1919. Thereafter it ceased to function; never did any business (R. 104), and on June 7, 1920 voted to transfer all its assets to Thatcher Company, and a bill of sale was made on that date. So far, however, as appears on the evidence, Sterling Company then had no assets, except such rights as might accrue to it by reason of its having contributed $500,000 to the purchase of the four companies, and possibly a small cash balance of a few thousand dollars, probably interest on deposits. It was dissolved September 9, 1920.

Its brief and inactive history is none too clear. It was apparently intended by Libbey, Ford and Baldwin

to be the vehicle of the large combination which Libbey had in mind if the Hartford patent rights were obtainable, namely, the four companies, the Hartford patents, and Thatcher Company.

But when the purchase of the Hartford patents fell through, and Libbey and Ford withdrew, and the whole affair fell upon Baldwin, Sterling became a fifth wheel to the coach, and wholly inoperative and negligible.

SPECIFICATION OF ERRORS INTENDED TO BE URGED

The Petitioner intends to urge

(a) **First Issue — Stock Acquisition** — That the Court below erred in holding that the Petitioner acquired any of the capital stocks of the Essex Glass Company, Lockport Glass Company and Travis Glass Company " in a manner inhibited by Section 7 of the Clayton Act " (R. 297.)

(b) **Second Issue — Power of Commission** — That the Court below erred in affirming the order of the Federal Trade Commission directing Petitioner to divest itself of the assets and properties (other than capital stock) of the Essex Glass Company, Lockport Glass Company and Travis Glass Company; and directing the Petitioner to take other action as to such assets and properties; and erred in directing the enforcement of such order. (R. 298.)

SUMMARY OF ARGUMENT

(1) There are only two issues involved. First — whether the Petitioner acquired stock in the " three companies " in violation of the Clayton Act. Second — whether the Federal Trade Commission has power to require the Petitioner to divest itself of assets other than capital stock.

(2) **On First Issue.** Petitioner denies that it ever acquired the stocks illegally. It possibly did, at the end, on July 3, 1920 acquire certain empty certificates which had neither assets, power, nor significance.

(3) Prior to July 3, 1920, it did not acquire these stocks. At the beginning, *all the stocks were acquired by three individuals, as their private, personal venture.* There is no evidence of transfer of the stocks from these individuals to Thatcher Company. If, as we claim, the title to these stocks went on August 28, 1919 to these three men, the charged acquisition against Petitioner fails.

The transaction had to be framed in the alternative to meet either of two possible contingencies. This accounts for much of the complexity of the transaction and probably for the unfounded suspicion of a subtle plot.

(4) It was essentially an individual affair. Those three men raised, on their own personal credit, 88% of the purchase price. At first, all three of them and later, the remaining one, were personally liable on the notes by which this price was raised; *none of them had any recourse to Thatcher Company for it;* two of them had no stock or other interest whatsoever in Thatcher Company and no reason to assume, gratis, heavy liabilities for it. Thatcher Company had no connection with these notes. When the first two men withdrew, the third associate, Mr. Baldwin, assumed all the liabilities, and exercised all the indicia of complete power over the "three companies." He then sought permanent financing, expressly keeping Thatcher Company wholly out of the deal. Finally when safe financing was assured he offered to Thatcher Company that if Thatcher Company would assume the financing and pay off his personal purchase liabilities, he would cause all the *assets* to be transferred to Thatcher Company. Thatcher

Company accepted; the assets were so transferred; Thatcher Company mortgaged all of them and its own, with the bankers secured by Baldwin, and with the proceeds paid off the notes and took the assets, all on July 3, 1920, and at the end some one received as an empty form the empty certificates of stock.

(5) There is nowhere above any acquisition of stock by Thatcher Company. The Court below came to a contrary decision, but only through what Petitioner respectfully regards as a fundamental error of law. That Court, admitting that three-fourths of the purchase price was raised by these individuals on their own credit, nevertheless, concluded *that this money so borrowed by individuals* DID NOT BELONG TO THEM *and, consequently, that the stocks purchased therewith were not theirs.* This erroneous conclusion settled the question of acquisition against the Petitioner. A contrary conclusion would have decided the case in favor of Petitioner.

(6) There are numerous minor points to be covered, arising, in the last analysis, because neither the Commission nor the Court below *has ever specified the exact time of the alleged acquisition or the facts constituting it.* The Petitioner has thus been left throughout, against its vigorous protests, in the unhappy necessity of proving a general negative in a quasi-criminal charge over ten months of complex transactions. It cannot be expected to give full consideration to all the remote and possible theories thus deducible.

(7) **On Second Issue.** The second issue is whether the Commission has power to order Petitioner to divest itself of assets and properties other than capital stock.

(8) The only *expressed* power given in the Clayton Act applicable hereto, is to order the divestiture of stock. Divestiture of plant assets must therefore be based on an *implied* power. Petitioner considers that

the statute is so specific as to leave no room for implied powers — that, as in the ordinary grant of power to an agent, the power delegated to an administrative body must be exercised within the *expressed* grant.

(9) The Commission, in ordering divestiture of assets, is attempting to remedy a *result*. The real purpose of Section 7 of the Clayton Act is to prevent an unfair *method* — the *holding* of stock which may result in restraint, etc. The real offense denounced in Section 7 is one of method *coupled* with a possible result, but not one of result alone.

Indeed, a main argument which will probably be urged against the Petitioner's position is that Petitioner's position practically nullifies Section 7 of the Act, because, (as is alleged in this case) it fails to cover the *result*, i. e., acquisition of assets. This is not so. It will always cover the *method*, the real offense. For example, whatever the construction of Section 7 — that Section will always be operative to prevent " the holding company " and the unfair method known as the " bogus independent " — a common device of great corporations, working through secret stock control. No power over plant assets is needed, under Sections 7 and 11, to prevent this. Section 7, therefore, is left intact as against such unfair methods, even on the Petitioner's theory as to power.

ARGUMENT IN FULL

PART I — ACQUISITION OF STOCK

(1) **Acquisition on July 3, 1920 Not Relevant.**—Let it first be admitted, solely for argument, that Thatcher Company did acquire these stocks on *July 3, 1920*. This late acquisition, however, was not against the Clayton Act, because prior thereto, or simultaneously therewith,

Thatcher Company had acquired all the *assets* by the direct vote and action of the *previous* holders (not Thatcher Company) of this stock passed one and two weeks earlier (R. 64-66; 68-71; 72-75); and therefore, such stock " acquisition " was

(a) Of an empty shell only;
(b) Had none of the specified effects as to restraint of trade, etc.;
(c) Did not and could not have resulted in securing assets, because they had already been secured; and
(d) Was, therefore, not in contravention of the Clayton Act.

(*Note.* The relevant portions of the Clayton Act are quoted on pages 42-43 below).

Therefore, any acquisition of the stocks on July 3, 1920 is irrelevant. Petitioner does not understand that the Commission bases its case on the acquisition of July 3, 1920. The Commission, in its Amended Complaint (R. 14) itself avers that the alleged acquisition took place " on or about the 28th day of August 1919 "; i.e. at the beginning of the affair. Further, the Commission itself has stated in its Finding, (R. 242), that " All competition between the Respondent (Thatcher Company) and the Essex Glass Company, the Travis Glass Company, and the Lockport Glass Company ceased not later than January 1, 1920." If this be so, subsequent acquisition of stock would not violate the Clayton Act.

(2) **Earlier Acquisition the Real Issue** – The real issue therefore, is whether Thatcher Company acquired the stocks *before* July 3, 1920, the closing date of the whole transaction.

(a) The Commission and the Court below hold that at some unspecified date, prior to July 3, 1920, and in some way and time not made clear either by the findings

of the Commission or the Court below, Thatcher Company did acquire the stocks of the said "three companies," and then used that acquisition to secure the assets on July 3, 1920.

(b) Thatcher Company denies this. It alleges that on July 3, 1920, it made a direct purchase of the *assets* and then and there paid the whole price therefor; that prior to that date, it had nothing to do with any control of the stocks, and that on the other hand, the acquisition of the stocks prior to that date was by certain *individuals purely as an individual and personal venture* over which Thatcher Company had no control; and that these individuals, or one of them, held these stocks until July 3, 1920, and then caused the assets to be sold to Thatcher Company, and Thatcher Company bought them, as it had good right to do.

(c) Everyone admits that ten months earlier, at the very beginning on August 28, 1919, *these stocks did change ownership and were then acquired from their original owners by somebody.* The Court below said "It is clear that, on delivery '(August 28, 1919)' the certificates were lodged with the Trust Company as collateral security for the loan to Baldwin, Libbey and Ford, and that the title on leaving the original owners passed to someone else. To whom?" (R. 295-6.)

The question is — who did this admitted acquiring? Was the transaction of August 28, 1919 (detailed above) a Thatcher Company venture, or was it the purely private venture of certain individuals? Thatcher Company alleges the latter. If it is correct in this claim, the case against it fails.

(3) **Basic Error of Court Below** — It is respectfully submitted that there was an underlying and fatal error in the prevailing opinion of the Court below on this issue of acquisition. This error arose from the

Court's interpretation of the transaction which took place on August 28, 1919 (see supra. pp. 10-11). It arose when the Court held that the acquisition of the stocks, (which was admittedly made on August 28, 1919), *was not made with the funds of these individuals,* Libbey, Ford and Baldwin. The Court, indeed, properly recognized that —

> " The balance or $1,610,000, Baldwin, Libbey and William Ford, * * * arranged to borrow from the Guaranty Trust Company of New York on their individual promissory notes, each note to be endorsed by the makers of the other two so that all were equally liable." (R. 291.)

The Court further, set up a test, in which we fully concur, namely, that the persons who furnished the purchase money must be the persons who real acquired the stocks. This is indeed a fair and common sense test. The Court, stating that the title had, on August 28, 1919, left the original owners, remarks —

> " When the title left them it went to somebody else. Who was it? This question may be answered by finding *whose money moved the title* from the original owners. Of this money, $500,000 was that of the Sterling Company. * * * *The balance of the purchase money was obtained from the Trust Company by Baldwin, Libbey and Ford on their personal notes."* (Italics ours.) (R. 295.)

So far, we respectfully concur in the facts stated by the Court, and in its reasoning. The inevitable next step, apparently, would be to hold that Libbey, Ford and Baldwin got the stock.

But here comes what we respectfully regard as a singular, and fatal, divergence from correct elementary

principle. The Court below proceeds at this point to the conclusion *that these three men, Libbey, Ford and Baldwin did not furnish the purchase money, although, as the Court itself stated, they "borrowed" it on their own credit, and were "liable" for it.* The Court remarks — (a remark which seems almost self-contradictory),

> "Baldwin had not contributed to the purchase any money of his own, although admittedly the purchase money was in part raised on the credit of his name." (R. 296). And again (R. 297) — "Baldwin did not own the stock because *he had never paid any money for it.*" Italics ours.)

This conclusion of course affects the *whole* of the purchase price, because the position of Libbey and Ford toward the purchase money was exactly the same as that of Baldwin, (save as to specific amount), and the Court must therefore have held the same as to all three men, namely, that they "had not contributed to the purchase any money of their own."

(4) **Does Borrowed Money Belong to the Borrower, or Not?** — This conclusion of the Court below appears to us to go against the most elementary principles of property rights. If a man borrows $1000 of a bank and gives his note, surely that money becomes his property. Whatever he purchases with that money, likewise becomes his.

The Petitioner believes that the pivotal error in the case is apparent in the foregoing excerpts. The Court, following uncontested facts, finds (a) that three-fourths of the purchase money was raised solely on the personal notes and credit of three individuals; (b) it further finds that the money so raised caused the transfer and acquisition of the stocks; (c) that these very stocks were deposited as collateral for these individual

notes; (R. 295), (d) but *then* it finds that this money so raised was *not* the money of these three men; that it did not belong to them! And, consequently, that they did not acquire the stocks bought with it.

This theory, using the Court's own test (p. 25), decided the crucial issue of acquisition of stock. If the Court erred, the case against Petitioner fails.

Of course, when such a conclusion is once accepted, any results may follow. The ownership of that money — and of the stocks purchased therewith — becomes broadly conjectural and may be assigned to anyone. Petitioner is wholly unable to check or follow any subordinate conclusions thereafter deduced.

(5) **Whole Transaction a Personal Venture of Three Individuals** — Furthermore, wholly apart from the matter of the purchase money, the transactions above set forth can have only one interpretation. They constitute obviously the personal venture, first of three men, Libbey, Ford and Baldwin, with Thatcher Company concerned only indirectly and to a total amount of only $250,000, (later, June 5, 1920, of $500,000), in the stock of the Sterling Company which, in turn, never acquired these stocks. Three months later, December 11, 1919, on Libbey and Ford's withdrawal, this venture, still individual, became the sole venture of Baldwin. He assumed all the obligations, earnestly worked to and finally did fund the obligations, meantime having honorably, and to his own risk, kept Thatcher Company entirely free from any entanglement. (R. 146; 198; 218, and evidence quoted above, pp. 14-16.) Then when the proposition had thus been drawn into a safe financial condition, all at the effort and risk of Mr. Baldwin, he offered the assets to Thatcher Company (R. 132) if they would take care of his personal liabilities. (R. 110; 132; 133; 146.) The offer was accepted. The " three companies " were caused, in June 1920, *not* by

Thatcher Company but by *Baldwin and his nominees, as the recorded votes show*, (and as the Commission states R. 17) to transfer their assets. (R. 63-65; 68-70; 72-75.) The assets thus acquired, were mortgaged to raise the necessary money; the note liabilities were liquidated and the transaction closed.

(6) **Thatcher Company Presumably Paid Purchase Price Only Once** — Thatcher Company thus on July 3, 1920, at the end of the transaction, paid the purchase price by assuming a bond mortgage of $2,000,000. (See Letter to Bankers R. 80) This has the weighty significance of cold cash. Up to that final date, Thatcher Company had assumed no obligation in connection with the affair, and had paid no money beyond the relatively small sum of $500,000 invested in Sterling Company. On July 3, 1920, on the other hand, it obligated itself for $2,000,000 and paid out $1,634,955 (R. 163.)

Now one thing is certain. *Thatcher Company certainly did not pay* TWICE *for these companies.* It certainly did pay the full price July 3, 1920 (R. 132.) The actual check is set forth in the record (R.163.) That then was the true date of any such title as Thatcher Company acquired, and all it got on that date was plant assets. The stocks on that date were without value or meaning. If Thatcher Company had really owned the stocks before July 3, 1920, it certainly would not have paid cash for the assets on that date. Any acquisition of stocks prior to that date was by some one else — as a matter of fact, was by the individuals above named. Prior to July 3, 1920, and consistently from the inception of the affair on August 28, 1919, to its end on July 3, 1920, individuals only were in control of these stocks, first, three individuals and then one. The " residuary legatee," Baldwin, was paid in his turn, on July 3, 1920, when Thatcher Company liquidated his debts. (R. 132.) Any attempt to locate the

title of these stocks elsewhere can be based only upon the fundamental error in principle of the Court below, in its finding that money borrowed by an individual is not his and that stock purchased therewith does not belong to him.

The prevailing opinion of the Court below holds that the Petitioner " paid no money * * * for the assets and plants of the ' three companies.' " (R. 297.) This is in line with the basic error above referred to. Thatcher Company certainly on July 3, 1920 encumbered all its property with a bond mortgage of $2,000,000 *and then paid over to the Trust Company the cash sum to liquidate the notes of the man who controlled the stocks in question.* The only consideration which Thatcher Company got was the transfer of plants and business. It is hard to imagine what Thatcher Company was doing in this transaction, if not paying money " for assets and plant." The Court below apparently formed the impression that this final transaction was a purchase of stock. It remarks (R. 296) " It is difficult to see how the use of the respondent's money in the purchase of the shares did not draw to it the ownership of the shares."

Now, if anything is clear in this record, these two facts are, namely

(a) That it was not " respondent's money," but the money of Libbey, Ford and Baldwin that bought the stocks at the start, and

(b) That the transaction of July 3, 1920 was, in form and substance both, a purchase of plant assets and not of stock.

(7) **Uncertainty Arising From Basic Error** — Following this basic error as to the ownership of borrowed money, a significant uncertainty runs through the record. The Court was in doubt as to who acquired these stocks on August 28, 1919. (R. 296.) It could

hardly have been otherwise. The Federal Trade Commission was also, obviously, in doubt. While these transactions covered nearly a year, nevertheless, the Commission merely found that the unlawful acquisition occurred *some time* during those ten months. The Commission in its Findings merely says: "The acquisition of the capital stock * * * (of the three companies) on August 28, 1919 *and the subsequent developments and transactions* (italics ours) constituted an acquisition by the Thatcher Manufacturing Company" etc. (R. 248.) In spite of the express requests and objections at once made by the Petitioner, (R. 251), the Commission declined to specify either the date of acquisition or the facts constituting it, leaving the Petitioner in the unhappy position (where it still remains) of having to prove a negative over this entire lengthy and complex transaction.

(8) **Intent** — The question of intent, though perhaps irrelevant, is referred to here because it seems likely that the Commission and, possibly, even the Court below, were unconsciously influenced by the suspicion that here was a deep and subtle intent to circumvent the law.

There never was any such subtle plot or intent. The very complexities of the transaction gave rise to such suspicion simply because neither the Commission nor the Court below grasped the real reason for these complexities. The real reason for them was not in any subtle purpose of these men. They were forced on them by the condition which they had to face. This condition was the alternative character of the original plan — a plan which had to meet either one of two very different contingencies. (Supra pp. 11-13.) The peculiar situation which faced these three gentlemen and which continued to develop through relentless circumstance, and not through their will, necessarily resulted

in a complexity of apparently unexplainable factors, such as the Sterling Glass Company and the like.

Wherever any intent does appear, by words or by conduct, it was plainly the intent either of Libbey, Ford and Baldwin or, with Libbey and Ford withdrawn, then the intent of Baldwin, to acquire and control these stocks. Thatcher Company did not want the stocks — had no use for them — kept clear of them — and only, at the end, wanted and decided to take over the assets.

(9) Baldwin had the right to offer these assets to the corporation and the corporation to buy them. This would perhaps be different if he had been acting as agent for Thatcher Company; if Thatcher Company had guaranteed him against loss, for example, or bore toward him the relation of principal to agent. One of the distinguishing marks of agency is that an agent is not personally liable for the business risks of the transaction. In the present case, nothing can be clearer from the evidence than the fact that Baldwin *was* personally liable; and Thatcher Company was not; that he had no recourse whatsoever to Thatcher Company; that Thatcher Company was in no way obligated to him in the deal and had no control over him; in short, was not his principal and he was not its agent.

(10) **Minor Issues** — The foregoing discussion contains the real essence of this first main issue. But a number of minor points must be covered briefly, due to this unhappy position in which the Petitioner finds itself, with the burden of meeting a quasi-criminal charge not specified as to time or factors.

(11) For example — the Court below remarks — "The Respondent (Petitioner here) admits that it holds the equitable title to the shares, for the reason that finally the shares were paid for with its money." Thatcher Company's officers did testify that it got, *finally*, the equitable title to the shares, but not that the

shares were paid for with its money in any significant sense. When these officers testified to the little knowledge they had about these certificates, they knew that Thatcher Company had bought all the assets; that it made no difference where the empty certificates were, and that if anybody had equitable title to them, Thatcher Company ought to.

(12) Again, in the so-called "Bond Agreement" of April 10, 1920, it was agreed by *Baldwin personally* that Thatcher Company should do various things. Thatcher Company was not a party thereto. It was the personal agreement between Mr. Baldwin and the bankers. (R. 44.) Nothing in it binds Thatcher Company.

(13) Similarly as to the report which Mr. Baldwin made to the Company in February of 1920. As usual with business men, he referred to facts from the business standpoint and not the legal point of view and made a number of actual, though perfectly innocent, misstatements. These, however, were statements of Baldwin only. They do not bind the Company.

(14) Again, the Court states that about January 1920, Thatcher Company itself took over the management of the four companies. (R. 292.) It is respectfully submitted that this is absolutely incorrect. The evidence, repeated frequently with no contradiction, shows that the management was taken over by Baldwin personally. Mr. Baldwin testified (R. 115) —

> "*Question.* Then the 1st of January 1920 the management and control of the Travis, Essex and Lockport companies was brought to Elmira, N. Y.?"
>
> "*Answer.* Yes, sir; under my control."

(See similar statements; R. 97 and 211.)

(15) Again, the Court places some weight upon loans between Thatcher Company and some of the "three companies." (R. 293.) Loans do not evidence ownership. While Thatcher Company did loan money to one company, another company loaned money to Thatcher Company. If this be ownership, which company is the owner?

(16) Again, the prevailing opinion states that if Baldwin owned the stock "then the shares still belong to him, for there is no evidence that he has sold them to the Respondent." (Petitioner here) (R. 297.)

Baldwin certainly did sell all the *assets* behind the shares to Thatcher Company. There is a mass of votes, deeds and bills of sale to prove this beyond all dispute. (R. 64, 66, 68, 70, 72, 75.) This done, who cared what became of the shares? He may still own them today, but they are waste paper.

(17) Again, there have been some vague suggestions that Thatcher Company somehow, presumably through Sterling Company, acquired somewhere, an *option* on these stocks. The only option Sterling ever had in these stocks was an unexercised right, under the basic contract. "Upon the payment of the said note (notes) all of the collateral thereto (the stocks) shall become the property of Sterling Company" (R. 37). Of course this means "payment" by Sterling. It certainly could not mean that if Libbey, Ford and Baldwin, or either of them, paid off the notes, the stocks would still go to Sterling. No court would have supported so absurd a claim. In any event, Sterling never did cause their payment (R. 122) and Baldwin did, by selling the assets to Thatcher Company. Furthermore, an option is not acquisition. It may never be exercised, as this one never was.

It was Baldwin, not Sterling Company, who was directly liable to the Guaranty Trust on all these notes,

as maker and endorser. Sterling was not on any of them. The Trust Company could have collected them from Baldwin. It had no such right against Sterling.

Sterling Company never was, and could not have been, the acquirer of the stocks. (a) It did not pay the dominant three-quarters of the price to the original stockholders. That payment was made by the Trust Company, who lent the money to Libbey, Ford and Baldwin, (R. 149). (b) Sterling was not liable, on the notes, for that money. (c) It did not pay off the notes, finally. (d) It never had more than $500,000 anyway. The Court below says (R. 292) " The Sterling Company had no money, for it had expended its whole capital of $500,000.

Thus, so far as Petitioner can see, that indirect interest of Thatcher Company, holding half of the stock of Sterling, in this unexercised " option " of Sterling Company, is absolutely the nearest approach to stock acquisition by Thatcher Company that appears anywhere in the record. If this be acquisition, then the word has been enlarged beyond recognition of established legal doctrine.

In fact, we are inclined to believe that the apparently " mysterious " presence of Sterling — simple enough when the alternative nature of the original plan is understood — has been the main factor in arousing suspicion. It is perhaps not too much to hazard the guess that if Sterling Company — which was organized only for a contingency which never was realized, and was discarded entirely when the deal for the Hartford patents failed — that if Sterling Company had never thus made its futile and meaningless appearance, there would have been no action against Petitioner.

(18) **Legal Definition of Acquisition** — " To make property one's own. To gain permanently."

1 Bouvier Law Dict. (3rd Rev.) 114.

" To get or gain by some lawful title; to make one's own according to some rule of law." *1 Cyc. Law & Procedure 630.*

White *v.* Waite 47 Vt. 502 (1874)

Question as to the date of a devisee's " *acquisition* " under a statute dealing with " property acquired " by a married woman.

Held. " While the right to a distributive share in her father's estate became vested * * * immediately upon the father's decease * * * yet the particular property did not become absolutely vested * * * until the decree of distribution," and the property was not " acquired " till then. (p. 507.)

See also 1 *Corpus Juris* 908; *Black Law Dict.* (2nd ed.) 20; *Walzen v. Board of Supervisors* 101 Calif. 15; *Allbright v. Sussex etc. Commission* 68 N. J. Law 523; *Le Flore County v. Allen*, 80 Miss. 298.

(19) **The Essential Issue of Acquisition of Stock.** All the foregoing minor considerations — discussed here simply out of abundant caution — can have little relation, however, to the one question of acquisition. Acquisition — title — must depend upon certain simple principles, which either operated or did not operate at a given time and because of certain primary facts.

The Petitioner claims that this entire complex transaction is explainable only by accepting one underlying fact, namely, that it was from the start and until July 3, 1920, the private, personal, individual venture of first, three men, and then one man. Mr. Baldwin. How, otherwise, can the following facts be explained?

(a) Over 88% ($1,860,000 out of $2,110,000) of the cash which bought these stocks was furnished solely by the personal credit of these three individuals. They

alone were financially responsible for this sum. (R. 198; 218.) Thatcher Company was not endorser or guarantor of the notes. (R. 94-95; 121; 204.) Is it likely that three men of such business standing would make themselves liable for this great sum solely to benefit a corporation in which two of them had no interest?

(b) None of these men had any guarantee from Thatcher Company against these large liabilities. *None of them had any possible recourse to Thatcher Company to relieve them thereof.* (R. 198.) Would business men have so involved themselves for the sole benefit of Thatcher Company without taking from the beneficiary at least some protection?

(c) Mr. Edward Libbey who was President of The Owens Bottle Company, and Mr. Ford, his business associate — neither of them had any stock holdings in Thatcher Company or the slightest interest therein. Why should they have mortgaged their credit for its benefit?

(d) If Thatcher Company had acquired these stocks at the start through the efforts of Libbey, Ford and Baldwin, it would at the same time have acquired the control of the eleven Hartford glass feeding machines held under license by the "three companies." These machines were dangerous business rivals of The Owens Bottle Company, (R. 90, 91). Indeed, it was because of that very rivalry that Mr. Libbey desired to secure for his own interests the control of the Hartford rights. Is it likely that Mr. Libbey, President of The Owens Bottle Company, would have been so ingenuous as to go into a transaction intended to supply Thatcher Company with a process rivalling that of his own company?

(e) *There is nowhere a single official act of Thatcher Company, or of its stockholders, or of its board of directors, relating to these stocks.* None of them took part in the important changes made during those ten

months as to the stocks, the officers and the business of the "three companies." Thatcher Company's name never appeared on the stock books of the three companies. (R. 157-158.) It never issued any proxy upon these stocks, or voted or attempted to vote them, or exercised or claimed any right in them whatsoever. (R. 127.) Mr. Baldwin went his way alone after Libbey and Ford dropped out, unsupervised, exercising complete powers. (R. 116; 132; 142; 175; 199; 211.) If this had been a Thatcher Company transaction, is it likely that that Company would have permitted Mr. Mr. Baldwin or that Mr. Baldwin would have dared, to commit Thatcher Company to a transaction involving over $2,000,000 (more than the total capital stock of Thatcher Company), without some official authority or ratification by Thatcher Company? When, at the close, Thatcher Company did buy the *assets*, the matter was laid before the stockholders (R. 59).

(f) Mr. Baldwin, wrestling with the financial burden thrown upon him, gives a humanly convincing piece of evidence on the real interests involved. *He knew*, whatever anyone else may now argue, that *he* was personally liable on these notes. He and his associates strained every nerve to rescue him. Meantime, Thatcher Company was entirely inert. If it were a venture of Thatcher Company, why did he not appeal to it for help? Why did he carry this burden alone?

On the contrary, *Mr. Baldwin deliberately and with the express concurrence of the directors of Thatcher Company, kept Thatcher Company entirely out of the whole transaction.* (See evidence quoted on pp. 14-16 supra.)

(g) If it was a Thatcher Company deal, why did Mr. Baldwin exercise full personal control after Libbey's withdrawal? Baldwin named the new transferees of the stock; Baldwin named the new directors and Bald-

win managed their businesses, and Thatcher Company took not the slightest notice of his doings.

(h) Finally, — Was there — could there have been — any form of legal or equitable procedure by which, at any time during the transaction and prior to July 3, 1920, Thatcher Company could have prevented Mr. Baldwin from selling these assets to anyone whom he chose! He and his associates had complete control of all the stocks. They were all of the stockholders, directors and officers of the companies. *They could have transferred these assets to the United States Steel Corporation or any one they chose.* (R. 199.) *Neither Thatcher Company nor anyone else could have prevented it.* AND IF IT HAD NO TITLE WHICH IT COULD ASSERT, IT HAD NO TITLE VIOLATIVE OF LAW.

This is certainly an extraordinary and unexplainable record if the affair was a venture of Thatcher Company. It is, furthermore, an extraordinary record for three business men, like Libbey, Ford and Baldwin, if we have to go on the theory that they did all that they did, solely and gratuitously for the benefit of Thatcher Company, and not as their personal venture. But viewed as the personal venture of the three men, every step is clear and self explanatory.

ARGUMENT IN FULL

PART II – POWER OF COMMISSION

(1) The second issue, that of the power of the Federal Trade Commission, has been raised by the action of the Commission (affirmed by the Court below) in directing Thatcher Company to divest itself of certain assets (not capital stock).

(2) **Stock Acquisition Assumed For Purpose of Discussion** – For the purpose of presenting this second issue, the Statement of Facts set forth above is inadequate, (pp. 9-19). Those facts, as Petitioner understands and has stated them, do not include one of the essential factors of this second issue. That is to say, – such power of the Commission over plant assets, if it exists at all under the Clayton Act, must be based on the premise that Thatcher Company secured these assets by means of acquiring the companies' stocks. (For convenience, the word " assets " is consistently used in this Brief in the sense of plant and business properties, as distinguished from capital stock).

Thatcher Company emphatically denies such acquisition of stock, as discussed in Part I above. But, for the purposes of discussing this second issue, we will nevertheless assume such facts as are necessary, namely;

(a) That Thatcher Company, did acquire the stocks of the " three companies " competing with Thatcher Company in interstate commerce, and then,

(b) Used such stock acquisition to secure the assets of the said " three companies;"

(c) With some of the resulting monopoly, restraint of trade or lessening of competition which is specified by Section 7 of the Clayton Act;

(d) That the "three companies" were all legally dissolved after such acquisition of assets and prior to the beginning of this action, and their stock thereupon ceased to exist.

(3) **The Order in Question** — Under such an assumption the issue is — Has the Commission power to require Thatcher Company to divest itself of assets, etc. (other than capital stock) or to require any other action regarding such assets?

The order of the Commission was as follows (R. 255).

"Federal Trade Commission *v.* Thatcher Manufacturing Company	Docket No. 738. Order to cease and desist and divest, etc. (modified)

"This proceeding was regularly heard by the Federal Trade Commission on a complaint duly issued and served on the Thatcher Manufacturing Company, the answer of the respondent thereto, a written stipulation of facts entered into by the respondent and approved by the commission, the testimony and evidence on file, and the briefs and arguments of counsel. Thereupon the Federal Trade Commission made a report in writing, in which it stated its findings as to the facts with its conclusion that the Thatcher Manufacturing Company is and has been violating the provision of an act of Congress approved October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and especially section 7 thereof.

It is therefore ordered that the Thatcher Manufacturing Company:

1. Cease and desist from the ownership, operation, management, and control of the *assets, properties,*

rights, and privileges acquired by it from the Essex Glass Company, the Travis Glass Company, and the Lockport Glass Company through its acquisition, ownership, and control of the stock or share capital of said companies, together with all improvements and additions made thereto from the time of such acquisition to the date hereof, which said assets, properties, rights, and privileges are hereby declared to have been acquired and are now held by the Thatcher Manufacturing Company in violation of law or as a result thereof, and cease and desist from the ownership, operation, management, and control of said *assets, properties, rights and privileges* in such manner as to restore in harmony with the law the competitive conditions, with respect to said assets, properties, rights, and privileges so acquired, which existed prior to such acquisition in the manufacture and sale of milk bottles in interstate commerce, and so that no part of such *assets, properties, rights and privileges* shall be held, owned, managed, or controlled hereafter by the Thatcher Manufacturing Company.

2. Divest itself of all *assets, properties, rights, and privileges* acquired by it from the Essex Glass Company, the Travis Glass Company and the Lockport Glass Company through its acquisition, ownership, and control of the stock or share capital of said companies, together with all improvements and additions made thereto from the time of such acquisition to the date hereof, which said assets, properties, rights, and privileges are hereby declared to have been acquired and are now held by the Thatcher Manufacturing Company in violation of law or as a result thereof, and divest itself of *said assets, properties, rights, and privileges* in such manner as to restore in harmony with the law the competitive conditions with respect to said assets, properties, rights, and privileges so ac-

quired, which existed prior to such acquisition in the manufacture and sale of milk bottles in interstate commerce, and so that no part of such *assets, properties, rights, and privileges* shall be held, owned, managed, or controlled hereafter by the Thatcher Manufacturing Company.

3. Divest itself of all the stock or share capital of the Woodbury Glass Company now held and owned directly or indirectly by the Thatcher Manufacturing Company, together with all right, title, interest, and claim in and to such stock or share capital, which said stock or share capital is hereby declared to have been acquired, and is now held by the Thatcher Manufacturing Company in violation of law or as a result thereof.

4. Submit within thirty (30) days from the date of this order, for approval by the Federal Trade Commission, a plan for the performance by the Thatcher Manufacturing Company of the terms of this order, jurisdiction for this purpose being hereby retained." (italics ours.)

(4) **Clayton Act — Relevant Sections** — The relevant portions of the Clayton Act are as follows —

> "SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

"Sec. 11. * * If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order."

(5) **Express Power** — As quoted above, the only *express* power conferred by the Clayton Act upon the Commission applicable to this case is the power to order divestiture of stock under Section 11 of the Act. No express power is given to order divestiture of plant or business assets.

The stocks of the said "three companies" having all ceased to exist before this action arose, (R. 221), an order merely to divest stocks would unquestionably have been meaningless in this case.

(6) **Implied Power Invoked By Court** — The Court below therefore, upholding the order to divest assets, based that decision apparently (and necessarily) on an *implied* power.

" The sole purpose of a valid order of the Commission must be to remedy an unlawful situation." (R. 297-298.) That is to say, if the situation is unlawful, there can be read into this particular Act any power necessary to remedy " the situation," regardless of the exact wording of the act.

It should be observed, in passing, that the Court below, in the belief of Petitioner, was in error — not only as to its expansion of the remedial power, but also as to the nature of the *offense* itself. The offense stated by Section 7 is the *acquisition of stock which may have certain results.* It is not the result alone. It is a *method combined with a possible result*, that violates Section 7. Mere restraint, monopoly or lessening of competition by themselves are not offenses under Section 7. The Petitioner believes that Section 7 was directed mainly at the so called " holding company," and not at merger of plant assets. We discuss this more fully below. (pp. 50-54.)

To revert, however, to the immediate issue, the extent of the remedy available;

We respectfully submit that the holding of the Court below as to the extent of the remedy is error. Congress in defining (in Section 7) the " unlawful situation," also (in Section 11) exactly defined and limited the remedy. One section is no more open to extension by interpretation than the other. Congress defined an offense; it then specified only one particular remedy — divestiture of stock.

If the language of Congress in Section 11 had been general instead of being specific; if, for example, Congress had given in Section 11 a general judicial power

to " remedy " (in the language of the Court below, R. 298), the unlawful situation, any effective remedy might be selected.

But Section 11 is specific and particular. Congress, following well-established precedents, did not desire to give to an administrative body a general power which is peculiarly judicial in character. Its language was therefore specific. Interpretation has no place against such particularity. " To divest stock " is to divest stock. It is not to divest assets.

(7) **Limits of Delegated Power** — A delegated power must be exercised within the limits expressed in the grant. A man gives to another an express power of attorney to raise $25,000 for him by selling certain stock. Suppose the agent then tries to raise the sum by contracting to sell the man's own residence. He has acted ultra vires and the principal can repudiate his act. The agent, (like the Commission in this case), may urge, indeed, that the power given was insufficient for the purpose — that the stocks were unsalable, etc. — and that he therefore had some other " implied power." That does not justify him. No more is the Commission justified. And, of course, the Court in an action like this, can only enforce the powers primarily conferred upon the Commission by the statute upon which this case was based.

Wilder Mfg. Co. *v.* Corn Products Co., 236 U. S., 165 (1914).

This case arose from an attempt to avoid a contract obligation on the ground that the other party was a combination in violation of the Sherman Law.

Held. Defense not valid. " Where a statute creates a new offense and denounces the penalty or gives a new right and declares the remedy, the punishment or the

remedy can be only that which the statute prescribes." (p. 174.)

(8) The Court below adduces a further ground for expanding by implication the statutory power, namely, " the familiar principle that a person cannot profit by his own unlawful act." (R. 298.)

Grant that a wrong has been done which cannot be remedied by the only power *here* conferred—the divesting of stock. The assumed " profiting " by the offender does not justify going outside of that statute and applying, in an action *based on the statute*, a power not contained therein. Once grant that a situation, irremediable under a specific power, can therefore be met by an indefinite extension of that power, then statutes — especially administrative statutes — become no longer law but vehicles of arbitrary power. Under this theory, the Federal Trade Commission when necessary could apply fine, imprisonment or eminent domain. As an administrative body, judicial in character, its powers must rest solely upon the statute.

(9) Citation of Authorities on Powers of Commission — The cases most directly analogous are those construing the powers of the Interstate Commerce Commission.

Beale & Wyman on Railroad Rate Regulation.

Chap. XXIV of this book, and the note under Section 1141 contain a good general review of the matter.

Interstate Commerce Comm. *v.* C. N. O. & T. P. Ry., 167 U. S., 479 (1897).

This was a basic case and thoroughly tried. The Act provided that " all charges shall be reasonable and just." Also that " the Commission is hereby author-

ized to execute and enforce the provisions of this Act."

The Commission had made an order condemning certain existing rates as unreasonable, and directing that future rates should conform to the given standard of reasonableness.

It was nevertheless

Held: Order invalid, as beyond the power of Commission.

" That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language." (p. 505.)

It is submitted that under the language of the I.C.C. Act above quoted the implication of the power so claimed was certainly far more justifiable than is the extension of power assumed in the case at issue.

I. C. C. *v.* Alabama M. Ry., 168 U. S., 144 (1897).

Raising the same question in a slightly different form, by means of an order fixing maximum and minimum rates.

Held: Invalid; as Congress had not given the power expressly, it did not give it indirectly. (p. 162.)

U. S. & I. C. C. *v.* Penn. R. R., 242 U. S., 208 (1916).

Order of I. C. C. to railroad to furnish tank cars to applicant.

The statutes defined " transportation " as including cars and " all instrumentalities * * * of shipment or carriage," and stated that " it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor * * * and the Commission is

hereby authorized and required to execute and enforce the provisions of this Act."

Held: That these statutes could not be construed as requiring the carrier to furnish a specific form of car like tank cars.

C. N. O. & Tex. Pac. Ry. *v.* I. C. C., 162 U. S., 184 (1896).

In passing upon the question of whether a given freight rate was reasonable the I. C. C. fixed a maximum rate.

Held: Not within the power of the Commission.

> "It is argued on behalf of the Commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so." (p. 196.)

So. Pac. Ry. *v.* Colorado F. & I. Co., 101 Fed., 779 (CCA 1900).

Order by I. C. C. fixing a freight rate.

Held: Invalid; no power. Decision follows I. C. C. *v.* C. N. O. & T. P. Ry. 167 U. S., 479 (above).

> "It may well be that the Interstate Commerce act would be much more effectual * * if the commission * * was empowered to prescribe a schedule of maximum rates in cases like the one in hand. But that power, it seems, has not been conferred, *and the courts cannot enlarge the authority of the commission by enforcing orders of that body which it has no power to make.*" (Italics ours.) (p. 786-7.)

(10) **Attempt to Remove Case from Clayton Act.**— It is argued that the jurisdiction of the Circuit Court of Appeals in this case is original and equitable. Little

objection need be raised to this proposition. But the aim of such argument, apparently, is to lift this whole case out of the Clayton Act (Section 7 and especially Section 11) and to urge the application to it of some other principles, not specified, but certainly going beyond the Clayton Act.

Whatever may be the nature of this proceeding, it is certainly a case under the Clayton Act, and no other, and must be disposed of under the powers conferred by that Act and no other.

This is either a proceeding under a specific statute, or a proceeding with no basis or validity whatsoever. If it be under such statute, that statute, with all its powers and limitations of power, applies throughout. The Petitioner has thus far had " its day in court " only under that Act and with reference only to its charges and penalties. It has not tried its case nor presented its evidence with reference to any other statute or accusation.

(11) **Earlier Position of Commission Adverse to Present Claim** — The Federal Trade Commission itself, has heretofore denied that it had the power now claimed. In their " Conference Rulings " (Bulletin No. 1 of January 21 1916), the Commission held that its only jurisdiction in respect to Section 7 is to prohibit the acquisition of capital stock with the results denounced in the Clayton Act. It held that the mere purchase of the property of such a competing corporation other than capital stock, is not prohibited by the Clayton Act.

Commissioner Victor Murdock appeared on behalf of an amendment before the Judiciary Committee of the House (66th Congress) on September 8-9, 1919, intended to give the Commission the power which it now claims to have. On page 21 of Serial 5 of the hearings, he testified as follows: —

> "Now in Section 7, Clayton Act, Mr. Chairman, Congress provided against a corporation acquiring the stock in competing companies. I think at the time Congress passed that Act, it was a wise piece of legislation. But Section 7 of the Clayton Act certainly needs strengthening now, because Section 7 does not include the word 'property.' * * * The Government cannot win where this is an acquisition of property instead of acquisition of stock as the law stands today."

Congress refused so to amend.

(12) **Section 7 of the Clayton Act Not Nullified By Position of Petitioner** — It will be urged that the contention of the Petitioner in this case *practically nullifies Section 7 of the Clayton Act*. The argument has weight if once the premises on which it is based are admitted, namely, that it does so nullify Section 7.

That argument is as follows. If the Petitioner is sustained as to the limited powers of the Commission, and the Commission has no authority over assets other than capital stock, then any company can acquire the stocks of competitors; at once cause a transfer of their assets to the parent company; dissolve the subsidiaries, and thus accomplish a very practical result, leaving the Commission helpless to take any action under Section 7, and thereby rendering Section 7 meaningless.

This argument however is based on the premise that the only purpose of Section 7 is to prevent the foregoing *result*, namely, the acquisition of assets. But Petitioner takes exception to this premise.

(13) **Underlying Purpose to Prevent Unfair Methods** — The underlying purpose of the entire Clayton Act as shown both in the Act itself and in the voluminous debate thereon was to *prevent* unfair *methods*

of competition. An analysis of the whole Act shows that;

Section 2 of the Act prohibits unjustified discrimination between purchasers of commodities.

Section 3 prohibits the unfair use of control of patents.

Section 8 prohibits certain forms of interlocking directorates.

Section 10 is aimed at the same general principle of improper inter-relations.

The rest of the Act is administrative and supplementary for these general purposes.

In the midst of these sections comes Section 7, which specifically prohibits, not the acquisition of assets — that is to say, a result, a completed process — but the acquisition of stock under certain conditions as a *method* which " may " produce certain results.

That is to say, all the substantive parts of the Act are directed at methods of accomplishing certain things.

(14) **Congressional Debate** — All this is borne out by the congressional discussion upon the Act. It was stated again and again, that this Act was not intended to duplicate the Sherman Law, but to supplement that law and to provide against methods tending toward undesirable results, rather than to remedy accomplished results, which is left to the much broader Sherman Law and the Federal Courts.

Senator Cummins, Chairman of the Committee in charge of the bill, said (Cong. Record 63rd Congress, 2nd Session, Vol. 51, Part 14, p. 14,474 — " This legislation is supplemental to the Anti Trust Law."

The discussion in the Senate covered several hundred pages, appearing largely between pp. 13,963 and 14,780. Wherever Section 7 (then called Section 8) was dis-

cussed, it was almost wholly with relation to its bearing on " holding companies " — its effect on the *holding* of stock in a competitor.

Senator Poindexter said, (Id. p. 14,317) — " Here it is proposed to specify a certain definite transaction and prohibit it, namely the corporate ownership of stock in a competing corporation, or the holding of stock in two competing corporations by a holding company."

(15) **" Bogus Independents "** — That discussion shows not only that Congress intended to remedy certain general evils of the " holding company " — an intent which is not nullified by Petitioner's position — but also at least one specific evil. It had become a common practice among great corporations to make use of so-called " bogus independent " companies. A great corporation would secretly acquire stock control of a smaller concern competing with the " trust " locally. It would then use this concern to cut local prices so as to destroy all real local competitors. This gave a very important advantage. The great corporation did not wish to cut its own open price list locally because that might affect its prices all over the country. But it could safely do so through the bogus independent. A part of the Congressional debate deals with this specific matter.

Senator Thomas (Id. p. 14,468) —

> " The holding company is a concern which enables people to do business with concealed weapons."

Senator Reed (Id. 14,457) was citing the case of a well known railroad, with many subsidiaries, and stated that if this road had bought these subsidiary lines openly it would have come before the public and the

Attorney General. But that "when they (the railroad), acquired secret ownership of the majority of the stock of these roads, which were held up before the public as independent companies, and the public led to believe that they had competition, they defrauded the whole public."

All this shows what Congress had in mind. It throws a good deal of light on Section 7. Assume that the contention of the Petitioner is correct. Assume that under the Clayton Act the Commission has power only over capital stock. Nevertheless, it would still always be true that Section 7 would prevent the general evil discussed, namely control by stockholding, as well as this unfair method of bogus independents. That is to say, under Section 7, and under Section 11 so limited, any corporation is prevented from *holding the stocks* of competitors. Section 7 is perfectly valid against such practice. If the Commission takes action under Sections 7 and 11, the parent corporation must either divest itself of the stocks acquired and the resulting secret control, or (as is alleged to have been done in this present case), actually take over the assets of the subsidiaries. Then it would come out in the open, with a revealed and recorded ownership of the subsidiary. The secrecy — the sole value of the bogus independent, — and the "holding" feature generally — are destroyed, the full responsibility of the parent corporation for the control and price policy of the subsidiary is revealed, and the unfair method eliminated.

(16) The position urged by the Petitioner in this case as to the limited power of the Commission, therefore, does not render Section 7 meaningless. It does not affect what the Petitioner urges to have been the main and logical purpose of that Section. It preserves in Section 7 that same general purpose which runs throughout the Act, namely, the prevention of a general,

as well as a specific unfair method of competition which would tend to lessen competition or restrain commerce.

This would appear to dispose of a weighty argument which can be offered by the Government in favor of the extended power of the Commission, namely, the argument that a decision in favor of the Petitioner would render Section 7 meaningless.

In fact, Petitioner respectfully submits that Sections 7 and 11 of the Clayton Act are not aimed at all at combination of plant assets, but only at stock control, when and so long as such control of itself is producing restraint of trade, etc. Combination of plant assets is, distinctly, not prohibited by the Act. Petitioner submits that merger or combination of assets as such, is not an offense under the Clayton Act, however arrived at. The very form of Section 7, which refers primarily to acquisition of stock which " may " have certain results, indicates this. It does not prohibit such results, but only stock acquisition. Section 11, which only specifies power to divest " stocks " is peculiarly apt in form if the true purpose of Section 7 be only to prevent the evils of the holding company, as Petitioner believes it is.

CONCLUSION

To sum up:

(1) The Petitioner did not illegally acquire the stocks in question, because the whole affair from the start was the private venture of three individuals, who acquired the stocks with their own money, and who later sold the assets to Petitioner, in exchange for full value, namely the assumption of the purchase liabilities. The whole series of ten months' actions by these individuals — and ten months' inaction by Thatcher Company, — is exactly consistent with this theory, and wholly inconsistent with any other.

(2) The Federal Trade Commission has no express power over plant assets under Section 11 of the Clayton Act. It is improper to read into this power delegated to an administrative body any enlargement of power based on necessity and implication.

(3) It is further improper so to extend such power, because there is no such necessity. The true purpose of Section 7 deals primarily with a *method*, and that purpose remains operative without any such extension. The Section is preserved in full force and meaning, without such forced extension.

(4) All that Petitioner ever did in this entire matter was to acquire for full value on July 3, 1920 plant and business assets. This it had the right to do.

The Petitioner therefore respectfully prays that the said judgment of the Court below be reversed.

THATCHER MANUFACTURING COMPANY,
Petitioner

By HERBERT KNOX SMITH,
Its Attorney

Office Supreme Court, U. S.
FILED
OCT 23 1926
WM. R. STANSBURY
CLERK

No. [redacted] 213

In the Supreme Court of the United States

OCTOBER TERM, 1926

THATCHER MANUFACTURING COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

REPLY BRIEF OF PETITIONER

HERBERT KNOX SMITH,
Counsel for Petitioner.

THE CASE, LOCKWOOD & BRAINARD CO.
HARTFORD, CONN.

TABLE OF CONTENTS

	Page
Acquisition of Stock	5-28
Commission's Theory of Acquisition	5
Did Libbey, Ford & Baldwin lend or give $1,610,000 to Sterling?	7
The alleged gift or loan to Sterling	7
Evidence relied on by Commission	8
First citation	8
Second citation	9
Third citation	10
Proper evidence lacking	11
The evidence to the contrary	12
Surrounding circumstances negative claim	14
Baldwin's underlying liability	17
Failure of Respondent's chain	18
The second link	19
Thatcher Company's small interest	20
"The Subtle Plot"	20
Realities, not form	21
Comments on Specific Points	23-28
Baldwin's ultimate liability	23
Mis-statement of notices of withdrawal	24
Woodbury Company	24
Baldwin's "admissions"	25
Axton options	25
Baldwin's control of four companies	26
Assets transferred July 3, 1920	26
Baldwin not acting as agent	26
Value of Sterling's guaranty	27
Baldwin's rights by subrogation	27
Thatcher Company did not pay for stocks	28
Competition ceased January, 1920	28

PAGE

Powers of the Commission 29-30

Authorities Cited

American & English Ency. 28

Brick *v.* Freehold National Bank 28

Freehold National Bank; Brick *v.* 28

No. 721

In the Supreme Court of the United States

OCTOBER TERM, 1926

THATCHER MANUFACTURING COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

REPLY BRIEF OF PETITIONER

PART 1.

ACQUISITION OF STOCK

For the first time in this case the Respondent has, in its brief in this Court, made a definite statement of its theory of the alleged unlawful acquisition of stock by Petitioner. The Petitioner is thus at last enabled to make a specific reply to a specific charge.

1. The Commission's Theory of Stock Acquisition.

The Respondent's theory of the alleged unlawful acquisition by Petitioner of the stocks of the Essex, Lockport, Travis and Woodbury Glass Companies is summarized on page 25 of its brief as follows:

> "The Thatcher Company acquired through its ownership of the stock of the Sterling Glass Company, the stocks of the Essex, Travis, Lock-

port and Woodbury Companies which were purchased and owned by the Sterling Company."

To state it more concretely, the Respondent asserts

(a) That the Sterling Company paid for the stocks in question at the start, and mainly with *money loaned to it* by Libbey, Ford and Baldwin, the three individuals prominent in the affair. This the Petitioner denies.

(b) That at some date during the transaction the Thatcher Manufacturing Company acquired control. The Respondent sets this date as December 11, 1919 or a little earlier. The Petitioner admits that it acquired such control on June 4, 1920.

(c) The conclusion of the Respondent then, (granting the premises) naturally follows, that as soon as Thatcher Company had a controlling interest in Sterling, it acquired, in the sense of the Clayton Act, the stocks in question, which, Respondent alleges, had been purchased and owned by Sterling.

Thus in broad outline Respondent's theory is a chain consisting of two links; first, the purchase and equitable ownership of the stocks by Sterling. Second, the control of Sterling by Thatcher Company.

This is the " chain of title " in the alleged offense. Upon this chain Respondent's case for unlawful acquisition has come to depend. This is the only line of connection between Thatcher Company and these stocks. If it fails at any point, the case for acquisition, and consequently the whole case against Petitioner, fails with it.

The facts of the transaction, save in one vital point, and certain other less important points, are not in dispute. With the exceptions just referred to, Respondent's brief has stated the facts correctly, and, without exception, fairly.

2. Did Libbey, Ford and Baldwin Loan or Give $1,610,000 to Sterling?

The vital fact in dispute is the claim of the Respondent that the bulk of the money which purchased the stocks — $1,610,000 — borrowed by Libbey, Ford and Baldwin on their personal notes, was then at once transferred by them to, or deposited in bank, to the credit of Sterling Glass Co., either as a loan or as a gift. This Petitioner flatly denies.

This question of fact is of first importance. The dominant issue on this branch of the case is the question of who paid for these stocks — whose was the money? The Court below made this the decisive test, which we discuss as such. Did Sterling Company, or did the three men own this money?

The Respondent admits that three quarters ($1,610,000) of the purchase price of the stocks was actually raised by three individuals, Libbey, Ford and Baldwin, on their own individual personal notes. It admits that this sum was borrowed by these three men at the Guaranty Trust Co., and was used to buy the stocks. The Sterling Company was not on these notes.

But at this point a really singular assertion is set up.

3. The Alleged Gift or Loan to Sterling.

Respondent at this point alleges that these three men, having raised this money on their own credit and made themselves liable for $1,610,000, thereupon loaned or gratuitously handed over this money to Sterling Company, which neither of them controlled, and without receiving from that company any note, receipt, memorandum, collateral or other evidence of debt or of security. This may have been as well a gift as a loan. There is no evidence either way on this particular point.

This assertion seems to Petitioner almost incredible.

4. The Evidence Relied Upon By Commission.

This claim is not based on any primary record; or on any statement of bank account — the obvious and best proof — or on any written evidence whatsoever. It rests on none of the usual and required proofs. It rests only on three doubtful and casual remarks of witnesses, made in wholly different connections, as follows:

Respondent's brief says (p. 27) "The proceeds of the notes of Baldwin, Libbey and Ford were deposited in the Guaranty Trust Company *to the credit of the Sterling Company.*" (Italics ours). In support it cites pp. 38-39; and 149 of the record.

Nothing on page 149 justifies this statement. The nearest approach is in the following testimony by Mr. Mandeville:

> "*Answer.* They (the proceeds of the notes) were deposited with Guaranty Trust Company and the Guaranty Trust Company through its representative, disbursed that money to the individual stockholders of the four companies."
>
> "*Question.* Was any other sum or amount placed with the proceeds of the notes?"
>
> "*Answer.* Yes, Sir."
>
> "*Question.* What was that?"
>
> "*Answer.* $500,000 that had been realized from the sale of capital stock of the Sterling Glass Co."

There is nothing else on p. 149 that can possibly be referred to in this connection.

The above testimony is no proof of a transfer of $1,610,000 from these three men to Sterling. We assume that Respondent interprets the words "placed with" as implying that both the $500,000 and the $1,610,000 were deposited to the credit of Sterling.

This is indeed a long leap. There is nothing here about any deposit to the credit of Sterling. It can just as well be argued that Sterling's $500,000 was deposited to the credit of Libbey, Ford and Baldwin. In any event "placed with" does not necessarily mean "deposited to the credit of." The phrase "Placed with" was that of counsel for the Commission. The witness in replying probably had simply in mind the fact that the two sums were used together. Title to a million and a half dollars can hardly rest on such evidence. It will further be observed that the Trust Company (not Sterling) "disbursed that money to the stockholders."

5. The second piece of evidence cited is pp. 38-39 of the record. This is part of a letter by Mr. Mandeville to Mr. Baldwin written about five days after the transaction. The portion which must be the part relied on is as follows:

> "You should receive from the Guaranty Trust Company a letter giving you the dates and amounts of all the checks *drawn by it* against the deposit to the credit of the above company. My figures show that I deposited $500,000, and the proceeds of the notes amounted to $1,610,000. * * * This made a total deposit of $2,110,000."

6. It is hard to tell just what line of deduction has been applied here. Possibly Respondent means to claim that the words "the above company" refer to Sterling, (which was mentioned earlier in the letter) and that the next sentence implies that both the amounts which Mr. Mandeville names were deposited by him to the credit of Sterling.

This is another long leap in the dark. The natural grammatical reference for "the above company" is to Guaranty Trust Company, the company most re-

cently mentioned. The Trust Company was the place where all of the funds were deposited, and the company which actually disbursed them (R 149). It will also be observed that Mr. Mandeville speaks of "all the *checks drawn*" by the Guaranty Trust Company. It certainly could not draw checks on a deposit in the name of Sterling. No checks of this amount drawn by Sterling appear anywhere. This evidence seems against, rather than for, Respondent's claim. Like the first piece of evidence, it shows that what really happened was that all of the money was deposited to the credit of the Trust Company, which then "disbursed" it.

Even assuming that "the above company" refers to Sterling, the next sentence does not state that this $1,610,000 was deposited to Sterling. Nowhere on p. 39 is there any specific sum stated as deposited to the credit of Sterling Company.

7. There is a third piece of evidence cited, p. 94 of the record, testimony of Mr. Baldwin.

> "*Answer.* The stock was transferred in blank to the Guaranty Trust Company and held by them as collateral security on the notes which we had discounted there on behalf of the Sterling Glass Co."

It is evidently the phrase "discounted on behalf of the Sterling Glass Co." to which Respondent refers. This might mean anything. Baldwin was doubtless thinking of his attitude of mind at the start of the transaction, when, like the other men, he fully expected Sterling to be the parent Company, and to take over everything, Thatcher Company, the four companies, and the Hartford patents, and when everything that they did was presumably being done "on behalf of Sterling." Such a phrase is too indefinite to prove

transfer of the title to $1,610,000 especially in the glaring absence of the one valid and best proof (if it existed), namely the books of the Trust Company.

There is also, on p. 11 of that brief, the statement that the proceeds of the notes and the $500,000 were "used by Sterling Company" to buy the stocks. Pages 95, 96, 113, 134 and 135 of the record are cited, but are probably not cited as supporting the phrase above quoted. Certainly there is nothing on any of these pages as to any use of this money "by Sterling Company."

This, then, is the evidence, and all of the evidence cited or relied upon by Respondent to establish this allegation, absolutely essential to its case, namely, the loan or gift of $1,610,000 from the three men to Sterling. For if Sterling did not get this $1,610,000, it could not have paid for the stocks and therefore did not own them. And, such as it is, this is all the evidence there is anywhere in the record which can be used to support this claim.

These three fragments of testimony, two of which support the Petitioner, rather than the Respondent, have been picked out of a record of over 200 pages of evidence, and practically all the rest of the record negatives the Respondent's claim.

8. All Proper Evidence Lacking.

There is no evidence from the Trust Company itself of such loan or gift; no certified copy of accounts; no written evidence of a loan or gift to Sterling; no plain or direct statement by anyone. This alleged fact, now so vital to Respondent's case, could (if it ever existed, which it did not) have been proved at the trial in the simplest and most convincing manner by introducing a transcript of Sterling's account in the Trust Company. This was not done. This incidentally indicates

that this present theory of the Commission is an afterthought. If it was a part of its original case, it surely was singularly neglectful in proof. However this may be, the whole case against Thatcher Company now hangs on these three fragments of secondary evidence, given when the present issue was not before the witnesses and from which only a forced construction can extract any support, and two of which support the Petitioner. And all this is in the considerable transaction of the alleged gift or loan by three individuals of over a million and a half dollars of their own money to a corporation.

This evidence, even taken by itself, does not seem to Petitioner to support the weight that is attempted to be suspended upon it, namely, the burden of the whole case, and the dissolution of the petitioning corporation.

9. The Evidence to the Contrary.

The evidence taken as a whole makes it clear that when it was taken no one had any idea that Sterling owned the $1,610,000 raised by the three men — neither the witnesses, nor, particularly, the Counsel for the Commission. They all assumed that Libbey, Ford and Baldwin owned this sum when it was used to purchase the stocks; that they agreed to " purchase the stock " (R. 93).

> " We (Libbey, Ford and Baldwin) paid for the stock in the different companies named." (R. 95-See also R. 96)
>
> " *Question* by Mr. Brindley, Counsel for the Commission: " In August 1919, what stock did you and Mr. Ford and Mr. Libbey and the Sterling Glass Co. purchase?"
>
> " *Answer* (by Mr. Baldwin). We bought the stocks of the Woodbury Glass Co., Travis Glass

Co., The Lockport Glass Co., and the Essex Glass Co." (R 97)

"*Question* by Mr. Brindley, 'So Mr. Libbey and Mr. Ford and yourself were the acquirers of these properties, weren't you?' "

"*Answer* Yes, Sir." (R. 110).

"*Question*, by Mr. Sheppard, Presiding Examiner: "Well as a matter of fact, the title to the Travis, Essex and Lockport companies was never in Sterling Glass Co., was it?"

"*Answer* (by Mr. Baldwin) No, Sir." (R. 112).

"*Question* (by Mr. Smith, Counsel for Thatcher Co.,) 'Who, actually, under that contract, did purchase the stocks of these companies?' "

"*Answer* (by Mr. Baldwin, after an interruption) 'Mr. Libbey, Mr. Ford and myself and the Sterling Company — the Sterling Company put in $500,000. The other three put in $1,610,000.' " (R. 127)

"*Question* (by Mr. Sheppard). And you were the sole owner, then, of the stock of the entire three companies?"

"*Answer* (Mr. Baldwin) I was; Yes, Sir." (R. 110).

Mr. Brindley, Counsel for the Commission, in seven or eight places in the evidence, enquired into this purchase. The substantive part of the evidence is contained in his questions. The witness usually only has to say "Yes" or "No." (See R. 94, 96, 113, 134-135, 149, 203-204, 223.)

His form of question is well illustrated on pp. 203-204, of the record. He asks about each note separately, and then

"*Question*, Then the money secured on these three notes, together with $500,000 secured from the sale of capital stock of the Sterling Glass Co., was used to purchase the capital stock of the Travis, Essex, Lockport and Woodbury Glass Companies, was it?"

"*Answer*, Yes, Sir."

10. Surrounding Circumstances Negative the Claim.

All the surrounding circumstances of the case negative this improbable loan or gift.

(a) These three men had raised this large sum on their own notes and credit. It was theirs and theirs only when they borrowed it. Each was liable for all of it. They would part with it only for full value under complete formal protection.

(b) There is not a scrap of written evidence of any such loan or gift. This in itself is fairly convincing. Business men do not thus casually throw a million and a half dollars from hand to hand, like a tip to a porter, without some written evidence or record of the transaction.

(c) The alleged deposit "to the credit of Sterling" with the Guaranty Trust Company must, of course, if it ever existed, have been entered on the Trust Company's books. It was the burden of Respondent to produce this. It was not produced. The point simply was not made or thought of at the trial, and Petitioner never was given a chance to produce, if needed, rebutting evidence. It is now raised for the first time, four years after the evidence was closed.

(d) To suppose that any of those three men would make such a gift or loan, is to suppose a business absurdity.

Take them one by one. Mr. Libbey, it is true, owned a half of Sterling stock, but Thatcher Company, in

which he had no interest, owned the other half. Would he have done this for a company which he did not even control? He took no evidence of loan, no collateral, no security. To be sure, it might be replied, that in the basic contract, Sterling guaranteed the payment of these purchase notes, and that this was his security. But Sterling had no money (R. 292, Opinion of Court). Its guarantee was worthless. Even if it can be held, as Respondent claims, that Sterling had an equitable title to the stocks, still these were then a very doubtful asset. They might, if properly handled, represent successful concerns and they might not; according to whether that very combine could be financed. Thatcher Company was shy of them. It refused to touch the proposition until it was properly financed (R 218). And, it may be added, Sterling's "equitable title" to these stocks was itself dubious. The existence of this present suit sufficiently illustrates this point.

Do business men part with large sums of cold cash upon inducements of this sort?

Again, take Mr. Ford, likewise liable on all the notes. He had no interest whatsoever in Thatcher Company or in Sterling, and Sterling's guarantee would have looked as inadequate to him as it would to Libbey.

Again, take Mr. Baldwin, likewise liable, and, under one alternative, liable to Sterling itself and all the others. He had less than a one-half interest in Thatcher Company and none in Sterling, and no more guaranty and, in the alternative which actually came to pass, he had no guaranty at all, but only an enormous liability. Why should he risk his entire personal fortune for the benefit of the other stockholders of Thatcher Company?

Men do not do business in that way. If they lend money they take notes for it. They do it, and properly, for personal advantage. They expect security and commensurate return. They take an ample margin of un-

questionable collateral. None of these commonplace factors appear in this alleged and remarkable gift or loan.

(e) This alleged gift or loan to Sterling was, according to Respondent's brief, for the real, final advantage of Thatcher Company. To establish this is the whole effort of Respondent's brief. Two of these three men, Libbey and Ford, had no interest in Thatcher Company. Baldwin had less than one-half interest. If this loan were really for the benefit of that Company, as Respondent must claim, then these men would certainly have asked for security from Thatcher Company, a real concern and the real party in interest. Libbey or Ford had no such security. As to Baldwin, he testified (R. 122; 198) that he had no recourse at all to Thatcher Company. In fact he carefully kept Thatcher Company out of it. (R. 146; 218).

(f) Furthermore, Baldwin, if Libbey withdrew, was the ultimate guarantor of everybody, including Sterling. The basic contract (R. 37) states: —

> "In the event of Libbey's retirement as aforesaid, Baldwin agrees to assume all liability hereunder, and all liability upon the said notes or in connection therewith of each and every of the other parties hereto."

Sterling was one of those other parties and was included in this guaranty by Baldwin. In short, Baldwin was, and was plainly intended to be, the ultimate guarantor, and so by fair implication of law and common sense, the ultimate inheritor and real party in interest, when Libbey and Ford withdrew.

Does this position of Baldwin fit in in any way with Respondent's theory of the loan or gift to Sterling and the resulting dominant position of Sterling?

Of all the provisions of the basic contract, this underlying liability of Baldwin was the one thing that took complete effect. Libbey and Ford withdrew.

"They dropped the whole load on my shoulders and I sweat" (R 110). Then Baldwin, in full control did finally, after enormous efforts, make into a reality a proposition theretofore mainly on paper. He was the man who accomplished the crucial and difficult act of financing; and put the whole thing on its feet.

The underlying personal liability of Baldwin (after Libbey's withdrawal) for the whole affair is likewise taken for granted by everyone who was involved in taking the evidence.

That liability is stated at least ten times (R. 110, 112, 122, 123, 132, 144-145, 146, 198, 199, 215-218). On p. 132, Mr. Sheppard, Presiding Examiner, asks:

> "*Question.* You under your contract assumed their rights and benefits and liabilities under the three notes?"
>
> "*Answer.* (By Mr. Baldwin) Yes, Sir" (R. 132).

Is it probable, in view of these circumstances, that Libbey, Ford and Baldwin started off in this matter with the purpose of blindly turning over everything to Sterling?

(g) Finally, the basic contract, supposed to recite the whole situation, states in detail numerous financial facts. But it has no word anywhere of any loan or gift to Sterling; not even in the clause where Sterling gives the guaranty and where such loan should certainly have been referred to as part consideration for the guaranty.

It would take pretty stiff evidence, in view of the above facts, to convince one of any such gift or loan; and it is respectfully submitted that still stiffer evidence

is in fairness required to justify the practical dissolution of the Thatcher Company.

11. Failure of Respondent's Chain.

So much for the first and absolutely necessary link in Respondent's chain — the attempt to connect Thatcher Company with these stocks through Sterling Company. It does not hold.

(a) The evidence cited by Respondent for this proposition is secondary, doubtful, and insufficient. The preponderance of it positively supports Petitioner. The only proper source was not resorted to.

(b) The three men did not give or loan to Sterling unsecured and unevidenced, $1,610,000. They kept the affair in their own hands, as their own personal venture (our primary brief pp. 27-28).

The idea of such a gift or loan is incredible. Men do not do business in such fashion. They do not deal in such large sums without some written record. Not even the basic contract refers to it.

(c) Sterling never bought the stocks, therefore, for the sufficient reason that it had not the money to buy them. The majority opinion of the Court below states (R. 292) — "The Sterling Company had no money, for it had expended its whole capital of $500,000 in supplying a part of the purchase money for the stocks."

(d) The underlying liability assumed at the start on one alternative, by Baldwin, and later made good by him, negatives the idea that either he or the others could have contemplated any blind and absolute surrender of the whole affair and its future to Sterling.

(e) Libbey, Ford and Baldwin personally furnished three quarters of the price of the stocks, and bought and held them as their own personal venture, later becoming the sole undertaking of Baldwin. Sterling never had any control of the stocks in question.

12. The Second Link.

The second link in the chain, namely the acquisition by Thatcher Company of Sterling, requires little comment, and with the first link broken, is anyhow useless.

There seems to be, indeed, in Respondent's view some question as to dates.

(a) Everyone agrees that on August 28, 1919, Thatcher Company held exactly 50% of the Sterling stock. This, of course, was not control. Libbey held the other half.

(b) It is also agreed that on June 4, 1920, Libbey's share of Sterling stock was transferred to Thatcher Company, giving the latter complete control. But it seems that Respondent claims an earlier date than June 4, 1920, for such complete control, apparently as early as December 11, 1919. Its brief (p. 32) speaks of an "agreement to purchase Libbey's stock." We do not grasp this. *Baldwin* so agreed, but Thatcher Company did not. It was not even a party to the basic contract. Nothing in that contract could transfer the Sterling stock, or anything else, to Thatcher Company.

Possibly this is simply a part of the general view of Respondent that Baldwin *was* Thatcher Company. Its brief practically says so (p. 35). Of course this was not so. (See pp. 26-27 below) As our primary brief pointed out Baldwin did not control Thatcher Company (R. 125-6; 130) Also, that in this whole matter he was acting for himself and expressly kept Thatcher Company out of it. (R. 146).

Whatever the date, it is of little significance. All that Sterling ever had was an unexercised option on these stocks. An option is not acquisition, and that is the utmost that Thatcher got by its control of Sterling.

13. Thatcher Company's Small Interest.

Of course, from the start, Thatcher Company always had a minor interest, a small venture in the matter. It invested $250,000 in Sterling stock; it paid certain incidental expenses; it took over the Hamilton license (a good investment in any event, and also a wholly separate transaction) (R. 148). It lent money to Woodbury and Travis Companies and borrowed money from Essex Co., all ordinary business transactions, denoting interest, but not approaching control.

As the basic contract shows (R. 36), it was originally expected that a new parent company would ultimately take over, not only Essex, Lockport, Travis and Woodbury Companies but also Thatcher Company itself. Thatcher Company therefore doubtless felt it wise to have a small stake in the venture. But it was, also wisely, not prepared to endanger its future by any commitment to the overwhelming load of the whole combine, unfinanced. "It would swamp them if it did," as one of its directors said (R 218).

14. "The Subtle Plot."

It is believed that Respondent, misled by the surface complexities of the affair, has mistaken form for substance; has not allowed for the business uncertainties which confronted the three men at the start; and has thus attributed to subtle and almost supernatural forethought a plan which was simply the best that these men could improvise in haste for their personal venture. Being a human improvisation, it had a lot of loose ends. These men were willing to take a personal risk to accomplish a large result. But they proposed to control it until they knew where they were coming out. Their real expectation was the creation of a parent company to absorb Thatcher Company and all the rest. But Libbey considered the Hartford patents an essential

part, and would get out if these proved unobtainable. Therefore they had to provide a " residuary legatee " for this contingency and Baldwin was willing to take this risk, which then doubtless, seemed to him remote. Respondent doubts the alternative nature of the plan. (Resp. brief p. 40). It seems to us self-evident. There were two diverging paths which might be followed; one with Libbey and Ford, the other without them. The basic contract speaks for itself in this respect.

Sterling Company was thus a tentative paper entity, a step toward the expected " Libbey combine," but it never got any real substance. It certainly at least was not intended as a cover, or an evasion. Respondent devotes much space to this (its brief pp. 41-44); to our mind quite unnecessarily. The three gentlemen in question and their legal advisers were certainly not so ingenuous as to hope to cover up an illegal action by such a flimsy device. Petitioner has never tried to do so. Sterling was created for a proper purpose which never was realized. It had no substance, played no part and disappeared when Libbey and his large combine idea fell out; it left the field then, obligations and rights alike, to Baldwin.

15. Realties, Not Form.

There is a natural tendency for the outsider in a case like this, to mistake form for reality, and to go into elaborate speculations, which are only afterthoughts. There were only three realities here, Thatcher Company; the group of three men; and the four companies. In order to combine Thatcher Company and the four companies, and possibly Hartford patents under any form of organization, required, first of all, *some group analogous to the promotion underwriter, who would take an interim risk and hold things pending financing, as Thatcher Company could not and would not do.* The

three men took that risk; two of them withdrew, dissatisfied. The third, bound by his contract, went on, and by hard work constructed the final keystone of the arch, permanent financing. Meanwhile he had, and had to have complete control. If the financing had failed Thatcher Company would never have had any further dealings with the affair. Baldwin succeeded, turned the property assets over lawfully to Thatcher Company, and in exchange got release from his burden of obligations, making no profit for himself.

In this set of hard realities Sterling has no place. It had no assets, no credit, no power. All sorts of fine-spun legal theories may be evolved as to its possible rights and equities. It accomplished nothing and amounted to nothing. Baldwin was the reality, the effective force that turned a paper plan into a working concern.

The dissenting opinion of Judge Buffington in the Court below does just what we are attempting, far less ably, to do in this Section. It strikes through complexity and form to the essential and permanent realities.

"The necessity for the prompt exercise of the options upon such properties, the unlooked for situation created by the withdrawal of his associates and the unloading of the whole financial burden on him (Baldwin) together with the complicated stock handlings made necessary in the successful financing of his original plan, gave the matter the appearance, but not the reality of a stock acquisition plan, but in my judgment, the transaction as a whole, in its original plan, its execution and effect, was an acquisition of property, not of stock" (R. 299).

COMMENTS ON SPECIFIC POINTS

Following are comments on special points in Respondent's brief.

16. Baldwin's Ultimate Liability.

Respondent throughout its brief has incorrectly understood the position of Mr. Baldwin under the basic contract, especially the fact that on Libbey and Ford's withdrawal, Baldwin took over the liabilities of all parties, *including Sterling's*. This fact was extremely important.

On pp. 12-13 of Respondent's brief, where a summary of the contract is given, this feature of Baldwin's underlying guarantee is omitted. The same omission occurs in another connection on p. 27 and again on pp. 37 and 40. Baldwin's guaranty is there referred to as being simply "additional" to Sterling's, instead of being, as was the fact, a guaranty underlying everything else, and carrying with it very broad liabilities, and resulting, finally, in real achievement. This consistent omission is serious. It probably explains in part Respondent's failure to grasp the situation as we understand it. It was this underlying guaranty of Baldwin that shows both the alternative nature of the contract, the personal character of the venture, and the true intent of the parties, namely, that if Libbey withdrew, Baldwin was to take over everything, rights as well as obligations. Obviously, Baldwin, who had good reason to know the intent of the contract, so understood it. When Libbey withdrew, Baldwin knew that on him alone rested the whole burden and his long anxious campaign of financing, plainly driven by that knowledge, is convincing proof of the situation.

It appears again and again in the testimony and is assumed as an obvious fact throughout (R. 98, 110, 122-123, 132, 145-6, 198, 199, 215-18). What is

this, if not an alternative? If the "Libbey combine" succeeded, Sterling was the party liable. If not, and Libbey withdrew, Baldwin assumed Sterling's liabilities as well as all others. The two situations are certainly not concurrent; they are alternative.

17. Misstatement of Notices of Withdrawal.

Respondent's brief (p. 13) states that the notices of withdrawal of Libbey and Ford were addressed to Thatcher Company as well as to Baldwin (citing R. 40, 41). This is a mistake. They were addressed solely to Baldwin. Baldwin so testifies (R. 129). Thatcher Company's name appears therein merely as part of Baldwin's office address.

18. Woodbury Company.

Respondent includes the acquisition of Woodbury Company stock as part of the case. It was dismissed by the Court below, on the ground that Woodbury's competition in milk bottles was negligible. Woodbury, long prior to the beginning of this affair, had decided to abandon the milk bottle business. Its main line was in condiment ware. In 1917 it had agreed to take Hartford-Fairmont machines to the full extent of its furnace capacity (R. 188-189), under licenses which expressly prohibited their use for milk bottles (R 181; 189). The total milk bottle production of the United States in 1919 was over 1,000,000 gross (R. 200). In 1919, Woodbury made only 8,000 gross (R. 189). By July 31, 1919, it had ceased that production entirely (R. 188), and had on hand a total of only 500 to 1,000 gross, mainly of "mis-lettered" and "off-capacity" bottles (R. 188). This remnant represented then its total potential competition. The Clayton Act requires a substantial lessening of competition. Nothing that was done with Woodbury could so be described.

19. Baldwin's "Admissions."

Respondent's brief quotes Mr. Baldwin's report to Thatcher Company stockholders of February 1920, (pp. 30; 36), and his agreement with the bond buyers in April 1920, (p. 14). Statements therein are urged as "admissions" against Respondent. This matter is sufficiently covered by our primary brief (p. 32). They are the statements of Baldwin only. They cannot bind Thatcher Company. They are obviously inaccurate in many respects. They are simply a fair sample of the business man's statement, interested only in a general result, and disregarding exact matters of methods. It would surely be unjust to base a grave injury to Thatcher Company in any degree upon the careless statements of an individual, neither authorized nor accepted nor ratified by the company. They cannot override plain primary documents of title, transfer and contract which form the actual legal basis of the transaction.

20. Axton Options.

The brief (p. 26) says that Sterling purchased the Axton options on the stocks (citing R. 40), and stating that it paid $100,000 for them. This is a mistake in fact. R. 40 does not state this, and there is no proof that Sterling owned the options. The real question is, who exercised them, and especially, who furnished the money for the option price? Libbey, Baldwin and Ford did. On page 93 of the record, Counsel for Commission asks Mr. Baldwin:

> "Was it finally agreed between yourselves and associates that you would own the options held by Mr. Axton?"
>
> "*Answer.* Mr. Libbey and Mr. Ford and myself; yes, sir."

21. Baldwin's Control of Four Companies.

That brief on p. 33 ignores, as it does throughout, the unescapable record fact that Baldwin and his nominees owned and had record title to every share of these stocks from December 8, 1919, (R 211; 224) until July 3, 1920. Baldwin was absolute master of the whole proposition. This control made it possible for him to deliver the business to Thatcher Company when it paid off his note obligations.

22. Assets Were Transferred July 3, 1920.

An error appears on p. 29 of that brief. It is there asked, by way of argument " How is it possible to account for the transfer by these companies of all their properties and assets * * * to the Thatcher Company for the nominal consideration of $1.00 some days before the day (July 3, 1920) when the notes were paid by it?"

Respondent evidently forgot here what it had itself stated earlier in its brief (p. 17) that the deeds and bills of sale of these assets, although dated in June, only " took effect upon delivery." Delivery was on July 3, 1920, the same day when the notes were paid (R. 225). Baldwin, of course, saw to it that these assets which he controlled should not be transferred till his note obligations were paid off — the sole consideration for the transfer. Thatcher Company only got these assets on July 3, 1920, and on that day, by check for $1,634,955 which is in the record (R. 163) paid, and for the first and only time paid, its price for them.

23. Baldwin Not Acting As Agent.

That brief (p. 35) asserts that Baldwin " must have been from the first, acting on behalf of Thatcher Company." This is wholly without basis. If anything is clear in this case, it is Baldwin's independent position.

Our primary brief deals with this on p. 31. If he was agent, why did he keep Thatcher Company out of the affair? (R. 198) If agent, why did he not call on his principal to protect him in his tremendous obligations, as it would have been bound to do? Why did he take no guaranty or security from Thatcher Company? (R. 198). Why was there no corporate action of any sort over a period of ten active months, either by way of authorization, instruction or assertion of rights?

The brief, similarly, on p. 33, states that on December 5-8, 1919, all these stocks were transferred to "officers and employees of the Thatcher Company." They were, as a matter of fact, all issued to Baldwin and the men named by him, and were entirely in his personal control. Unless it can be shown that Baldwin was in this matter acting for the Thatcher Company (and it cannot, as stated just above), the fact that he and his nominees were connected with Thatcher Company has nothing to do with the case.

There is also, on p. 26 of Respondent's brief, the remark that the Court below found that the original owners of the stocks "parted with title to them to the Sterling Company," citing R. 328-330. We find nothing in these pages to support that conclusion.

24. Value of Sterling's Guaranty.

This is referred to on p. 36 of Respondent's brief. It has already been dealt with on p. 15 above.

25. Baldwin's Rights By Subrogation.

The brief (p. 37) discusses Baldwin's rights in the stocks which correspond to his duties as guarantor. It implies that if a man assumes the obligation of another on notes secured by collateral and finally pays those notes, he has no right in that collateral, except by special agreement.

This, we submit, is an error of law. He does get such collateral by virtue of the well-established principle of subrogation.

> *27 American and Eng. Ency., 207.*
>
> "The general rule is that a surety who pays the debt of his principal will be subrogated to all the securities, liens and equities, rights, remedies and priorities held by the creditor against the principal."
>
> *Brick v. Freehold National Bank, 37 N. J., Law 307.*

A surety on a note defended a suit against him by the holder of the note, which was secured by collateral. The surety claimed that the creditor had not first sold the collateral.

Held. No defense. "The surety may at any time after the debt becomes due and owing discharge it and take the collateral."

26. Thatcher Company Did Not Pay for Stocks.

On pp. 38-39 of that brief there is a considerable argument to the effect that Thatcher Company had to pay off the notes to get the stocks. This is begging the question. Thatcher Company did not want the stocks, and never got them until they had been stripped of all substance. What it wanted and got was business assets.

27. Competition Ceased January, 1920.

The argument on p. 44 of that brief as to cessation of competition is not tenable. The Commission itself found (R. 242) that all competition between all of these companies ceased January 1, 1920. Thatcher Company owned only 50% of Sterling stock up to June 4, 1920. This is not control, even if Sterling did own the 4 companies. Therefore, Thatcher Company could not have caused such competition to cease in January, 1920.

PART II.

POWERS OF THE COMMISSION

1. We shall not try to add on this subject anything to what has been said in our primary brief on pp. 39-54, except to comment on a few points in Respondent's brief.

2. That brief (p. 47), asserts that the Clayton Act " expressly confers authority " to require the divestiture of the rights which the certificates of stock represent.

We do not understand this assertion. The Clayton Act (Section 11) simply says " divest itself of stock held." There is no mention of rights.

There is certainly no " express " grant.

3. The only citation of legal authority which Respondent's brief makes on the vital question of the extension of statutory powers by implication, is to a text book. The authority is highly respectable, and while very broad in its assertion, is to the point.

But over against it stands the long line of great cases decided by this Court in the past 30 years, and cited in our primary brief (pp. 46-48). These cases seem to Petitioner seriously to modify the position of the text book cited.

There is no valid distinction in these cases such as Respondent attempts to make, between the power of regulation and the power of remedy. Regulation is remedy. Regulation can be carried to any extremes if we once grant that statutory remedies are indefinitely expansible by implication.

4. It is believed that all the other arguments in this portion of Respondent's brief have been sufficiently discussed already in our primary brief.

The decision of the Court below should be reversed.

HERBERT KNOX SMITH,

Counsel for Petitioner.

No. [redacted] 213

In the Supreme Court of the United States

OCTOBER TERM, 1926

THATCHER MANUFACTURING COMPANY, Petitioner

v.

FEDERAL TRADE COMMISSION, Respondent

PETITIONER'S INDEX TO EVIDENCE

THE CASE, BROTHERS & BRADFORD CO.
HARTFORD, CONN.

INDEX TO TRANSCRIPT

Federal Trade Commission

vs.

Thatcher Manufacturing Co.

Abbreviations:—

H-F = Hartford-Fairmont Co.
"Milks" = Milk bottles
"Stocks" = The stocks whose acquisition is charged
Th. Co. = Thatcher Mfg. Co.

Acquisition of "stocks"	135; 140; 149; 156; 159
Occurred Aug. 28, 1919	113; 135
Alternative Plans	98; 121; 136; 144-5; 147; 157; 199; 223
Amended Complaint	11-18
Answers	
Original	5-11
To amended complaint	19-26
To final order	256-8
Assets	
Bought by Th. Co.	99
Impossible to segregate	130
Mixture & changes	130
Transfers	99; 110; 111; 132
Assignments of H F Licenses	128; 219-20
Assurance by Th. Co. None to Baldwin	145-6
Atlantic Bottle Co.	109; 120
Aug. 28, 1919 Meeting	94; 95-6; 113; 168; 171; 173-4
Automatic Units	87-8
Axton, I. T.	
At meeting Aug. 1919	94; 171; 173-4
Connection with merger	105
Employed by Stirling	93
Failure of 1st merger	93; 105; 167
First meeting Baldwin	92

Holdings in Woodbury	166
Ignorance of milk production	173; 176
Letter of Aug. 28, 1919	176; 177; 231
Never controlled Woodbury	178
Options	105; 133-4; 174
Position	166-7; 172; 176
Testimony	166-179
Baker, Ayling & Co.	217
Baldwin, F. E.	
Assumption of purchase obligations	110; 121; 132; 138; 144; 198; 215
Bond Agreement	44
Control of 4 Cos.	110; 111; 116; 150; 154; 211; 224
Did not control Th. Co.	125-6; 130
Equitable owner of "stocks"	122
Holdings in Woodbury	182-3
Ignorance of Woodbury "milks"	117; 179; 184; 203; 210
Ignorance of Woodbury competition	180; 185
Liabilities	121; 122; 123; 137; 138; 144-5; 198; 215
Never controlled Th. Co.	130
No recourse to Th. Co.	122; 198; 218
Nominated transferees of "stocks"	150; 154; 211; 224
Personally owned "stocks"	110
President of Th. Co.	86
Protected Th. Co.	110; 112; 145; 146-7; 198; 199; 218
Report of Feb. 18, 1920	41-44; 111-12
Explanation	112
Sole liability	112
" owner	132
Testimony	86-143; 160-1; 179-187; 198-215
Visit to Woodbury	183
"Baldwin & Associates"	93; 94; 95; 103; 106; 110; 134
Agreed to buy "stocks"	93; 94; 134
Defined	93
Took "stocks"	103

Bankers 160
Beckman, Menker & Griscom 224
Berney-Bond Gl. Co. 109; 120
Bessire Co. 188; 201
Bills of Sale & Deeds
  Effective on delivery 155
  Prepared 154
  Stirling Co. 58
  Travis Co. 66
Blodgett & Co. 217
Bonbright & Co. 116; 160
  Bond Agreement 44
Bonds
  Conversion to stock 185
  Paid off 184
  Prospectus 79
  Terms 77
Bond Agreement 44-53; 117; 137-8
  Baldwin did not hold proxies 126
  Explanation 117
Bond issue
  Date of completion 129-30
  Use of proceeds 139
  Mortgage 210
Branch offices 101; 129
Buck Gl. Co. 109; 120

Campbell, Heath & Co. 216
Canton Securities Co. 217
Cessation of competition Jan. 1, 1920 116
  So found by Commission 242
Chase Securities Co. 218
Checks
  For $1,634,955 to pay notes 143
  Th. Co. to Stirling Co. 162
  " " " Libbey 162
  " " " Guar. Tr. Co. 163
Chattanooga Co. 109; 120
Clark, G. H. 153; 173-4; 178; 182; 213
Clayton Act.
  Discussion of 174-5

Collateral
  For notes — 96; 98; 106; 113; 123; 135; 141; 149; 151
  In Contract — 222
Collins, F. L. — 140; 151-3
  Testimony — 161-5
Competition — 114; 115; 141
  All ceased Jan. 1, 1920 — 116
  So found by Commission — 242
Competitors — 109; 115-6
  19 Competing furnaces — 109-110; 120-21
Complaint; original — 1-4
Complaint; amended — 11-18
Complete units — 92
Conclusion — In Findings — 249
Conclusions of Law by witnesses — 135; 140-1; 159; 209; 212; 213
Contract of Aug. 28, 1919 — 36; 121
Control by Baldwin — 115; 116; 132; 142; 154; 175; 199; 211
  Resignations at his option — 142
  Free to dispose of stocks — 199
Cost of manufacture
  Increase — 107-8; 124
  Savings — 107-8

Deeds
  Conveyed only realty — 156
  Delivery — 225
Diamond Co. — 109; 120; 121
Directors of "4 Cos."
  Reasons for changes — 152
Dissolution of Cos. — Dates — 221
Dividends — Th. Co. — 107

Early negotiations — 92-3; 105; 133-4; 168
Economies — 107; 108; 123-4
Efficiency
  Allowed price reduction — 124
  Of H-F feeder — 117
Eldridge & Co. — 217
Endorsements of notes — 94-5; 121; 204

Equitable ownership of
" stocks " 122; 127; 213
Errors 28; 91;106; 155; 194; 250

Essex Glass Co.
Assumption of liabilities 71
Bill of sale 70
Licenses assigned 120
Location 102
Option 31-2
Request to transfer 67; 70
Stock bought 103
Stockholders meeting 68
Examiner
Substitute 165
" Exchange "
Milk bottle mfrs. 213
Exclusive rights
On Owens & H-F machines 100
Exhibits — List 27-29
Extension of Endorsement 137

Failure of 1st merger 93; 105; 167
Failure of H-F merger 136; 144
Federal feeder 91
Feeders — outside 91; 118
Financing 110; 122; 137; 144-5; 199; 200; 216-18
Companies approached 216-218
Findings 232-249
Conclusion 249
Forming machines — outside 119
Ford, Wm.
Controlled by Libbey 157
Withdrawal 40; 113
Furnaces 109-10
19 Competing 120-21
Th. Co. had eleven 109
Future uncertain 121

Glass making — technique 118
Graham Feeder 91
Griffiths 217

Guaranty Trust Co.
Carried notes 106; 199
Meeting there 93-4; 95-6; 113
Purchase through 103

Hamilton Co.
Business 90
No stock bought 97; 148
Restriction on business 117
Used H-F feeder 97
Hamilton license 97; 147-8
Hand process 88
Hartford-Fairmont Co.
Exclusive licenses 100
Failure of attempt to purchase 136; 144
Important factor in deal 144
Htfd.-Fairmont licenses
Assigned 128; 220
Hartford-Fairmont machines
At Woodbury 184; 189
On market in 1916 91
Successful 91
Took up total Woodbury capacity 189
Used by 4 Cos. 90
Hemphill, Noyes & Co. 44; 160
Henshaw 216
Howard Feeder 91

Illinois Glass Co. orders 192-3; 195
Filled by Th. Co. 201
Illinois-Pacific Gl. Co. 109; 120
Improvements — Owens Machine 100; 164-5
Individuals — Purchase of "stocks" 93-94; 110; 112; 113; 122-123; 127
Intention of parties
General merger 146
Inter-company loans 161-2; 164
Inter-state commerce 87

Jacksonville Co. 109; 121
July 3, 1920 meeting 159-60

Keep 151
Kimmel, L. M . 153
  Position 187-8
  Testimony 187-198

Lamb, R. M. 151-2
Lamb Glass Co. 109; 120
Law, conclusions of 135; 140-1; 159; 209; 212; 213;

Letter of Axton to Guar. Tr. Co. 231
Letter of Th. Co. to Commission 228
Letters of withdrawal 40; 41; 113
Liabilities on notes 135
  Of Baldwin 121; 122; 123; 137; 138; 144-5; 198; 215

  Th. Co. 132
Libbey, E. D.
  Continued endorsement 137
  Controlled Ford 157
  Dropped out of deal 110; 112
  Entry into deal 105
  Interest in deal 144; 199
  Letter of withdrawal 41; 113
  Main reliance on 122
  Position 105
  Pres. of Owens Co. 105
  Repaid 114; 130-1; 138; 162-3; 227
  Withdrawal 41; 113; 136
    Known to Baldwin 137
    Addressed to Baldwin 129
    Not addressed to Th. Co. 129
Liberty Gl. Co. 109; 120
Licenses — Assignments 219-20
Linton & Scott 195-7; 200; 201
  Contract 177
  Did not cover " milks " 201
List of exhibits 27-29
Loans between Cos. 161-2; 164
  Explanation 164
Lockett 217
Lockport Glass Co.
  Assumption of liabilities 76
  Bill of sale 75

Business	89-90
Licenses assigned	120
Location	102
Option on	32-3
Organization	102
Request to dissolve	72
" " transfer	74
Stock bought	103
Stockholders meeting	72
Territory	89
Transfer of assets	75
Long contracts on " milks "	180
Luce	151
Lucking, Wm.	174; 177
Machines — complete units	92
Management of 4 Cos.	
By Baldwin	97; 115; 211
Transferred to Baldwin	97; 115
Unchanged till Jan. 1920	115
Mandeville, H. C.	140; 146; 147; 151-2
Efforts in financing	110; 216-18
Ignorance of Woodbury " milks "	221-2
Letter to Baldwin	38; 148
" " Commission	148; 228
Position	143-4
Pres. of Stirling	147
Testimony	143-161; 215-228
Vice Pres. Th. Co.	101
McComb, W. E.	151
Meeting of July 3, 1920	159-60
Meeting of Aug. 28, 1919	94; 95-6; 113; 159-60; 171; 173-4
Meeting of Th. Co. stkhldrs.	53
Merger	See Plans for
Merger — outside concerns	98
Milk Bottles	
Mis-lettered	188
" Off capacity "	188
Price	107
Increases	107
Reductions	108

Reports to Mfrs. Exchange	185; 186
Sold on long contracts	180
Total U. S. prod'n.	200
Mills, Mrs. H. F.	101
Mis-lettered milk bottles	188
Negotiations — early	92-3; 105; 133-4; 168
Niver, R. W.	140; 151-3
Nominations by Baldwin	115; 150; 154
Notes — Purchase	
Amounts	94; 95
Carried by Guar. Tr. Co.	106; 135
Date of payment	143
Deposit of proceeds	149
Duration	106
Endorsements	94-5; 96; 121; 204
Execution	203-4
Final payment	99; 143
Not paid by Stirling	122
No change	135
On demand	106; 135
Payment	99; 131; 136; 139; 143; 153; 160; 163
Purchase by means of	113
Use of proceeds	94; 112; 113; 121; 135; 149; 204
"Off capacity" milks	188
Officials of 4 Cos. — Resigned	175
O'Neil machine	91
Operation of 4 Cos.	
By Baldwin	97; 115; 211
Options	92-3; 167
Essex to Axton	31-2
Hamilton License	148
Lockport to Axton	32-3
Stirling	122
To Axton	105; 134; 174
Travis to Axton	30-31
Order	
Final	255-6
First	249-50
For hearing	250-1; 253

Original complaint	1-4
Outside concerns in merger	98
Outside Feeders	91
Federal	118
Graham	118
Howard	118
Miller	118
O'Neill	118
Outside Forming Machines	119
Outside licensing	119
Outside machines	118
Complete units available	119
Not controlled by Owens or H-F	119
Open for licensing	118-19
Owens Bottle Co.	87
Th. Co. since 1905	
Owens machine	87
Exclusive	88; 100
Improvements	100; 164-5
Only automatic	88
Pacific Coast Gl. Co.	109; 120
Patents	
On machinery	130
Payment for "stocks"	
By 3 notes & Stirling cash	94; 95; 96; 106; 113; 121; 127; 135; 141; 149; 223
Percentage of business — Th. Co.	105-6; 123
Pickard, Watson	152
Plans, alternatives	98; 121; 136; 144-5; 147; 157; 199; 223
Plans for merger	
Failed in part	98
For general merger	144
Under Stirling	223; 227
For big new company	105; 112
For outside interests	98
Prices — Milk Bottles	
Increases	124
Decreases	124

Proceeds of Notes — Deposited 149
Production
  Th. Co. 128; 160-7; 186
  Woodbury Co. 176; 186; 189; 196
Prospectus for Bond Issue 79
Proxies on "stocks"
  Never issued by Th. Co. or Stirling 127
Purchase of "stocks" Aug. 28, 1919 94; 95; 96; 106; 113; 121; 135; 141; 149; 223
Purchase by individuals 93; 94; 97; 110; 112; 113; 122; 123; 126-7
Purchase money — How raised 94; 112; 113; 121; 135; 149; 204
Purchase price See "Purchase of stocks"

Raising purchase price
  See "purchase money — How raised"
Record title of "stocks" 98; 115
  Not changed 115
  Transfers on books 157-9; 204-6; 207-8
Reed Glass Co. 109
Release of Libbey & Ford 98
Report to Stockholders 41-44; 111
  Explanation 112
Request for greater certainty
  On first modified order 251-3
  On second " " 254
Requests
  To dissolve Lockport 72
  " transfer " 74
Resignation
  Of old directors 175
Resolution to issue complaint 1
Richmond Gl. Co. 120
Robinson, P. W. 140

Savings — in costs 108
Semi-automatics 88
  Several successful 91
  Usable as units 91

Sheppard, W. W.	85
Appointment as examiner	
Simultaneous issue & payment	160; 224-5
Statement for bond issue	79
Stirling Co. stock	
Issued for cash	95
Half held by Libbey	95
" " " Th. Co.	95
Purchased by Th. Co.	159
Source of funds paid	162
Stirling Glass Co.	
Bill of sale	58
Capitalization	104
Did not own " stocks "	126
Did no business	104
Directors meeting	60
Explanation of certain testimony	123
Incorporation	34; 103-4
Issued no proxies	127
Never paid notes	122
Not stockholder in 4 Cos.	180
Option	122; 226-7
Ownership of	95; 114
Request for dissolution	54
Stockholders meeting	55
Stipulation	26-84
" Stocks "	
$2,110,000 paid	95
Acquisition occurred	113; 135
All " acquired " at same time	141; 212
Agreement to purchase	93
Bought with 3 notes & Stirling cash	113; 121; 127; 135; 141; 223
Collateral	96; 98; 135; 141; 149; 151; 153; 182; 204; 223
Final disposition of certificates	139; 208
No consideration of transfers	116; 151; 154; 163; 208; 209
None transferred to Th. Co.	122; 127; 212-13

Ownership	110; 112; 156
Transfers in Dec. 1919	150-2; 153; 204; 206; 207-8
"Stocks"	
As collateral for purchase notes	96; 98; 106; 113; 123; 135; 141; 149; 151
Stock Books	180; 181; 182
Complete holdings	205-8
Stock Book Record	
Travis	204-5
Essex	205-6
Lockport	206-7
Woodbury	207-8
Stock transfers	
Directed by Baldwin	115; 211; 224
Stockholders of Th. Co. — Meeting	53
Technique of industry	118
Term of notes	106
Thatcher Mfg. Co.	
Assets included in mortgage	187
Brought subsequently into deal	146-7
Business	87; 106
Common stock no par value	107
Competition with Woodbury	186
Could not demand "stocks" from Baldwin	198; 199; 218
Directors meeting	59
Dividends	107
Increase of stock	53; 137
In inter-state commerce	87
Kept out of deal till financed	110; 112; 145; 146-7; 198-99; 218
Liability	132
Market value of stock	106-7
Might be merged	93; 146
Milk bottle production	128; 160; 186
No assurance or guaranty to Baldwin	122; 198; 218
Never owned "stocks"	127; 130; 157-8; 180
Organization	100-2

Original capitalization	101
Percentage of business	105; 106; 123
Plants	101-2
Production figures	128; 160; 186
Protected by Baldwin in deal	110; 112; 145; 146-7; 198-99; 218
Sales	87; 186
Statement, for bond issue	79
Stirling stock bought	159
Stockholders meeting	53
Territory covered	87
"Theory of acquisition"	113
Tigner, C. M.	152
Transfer of assets	
Caused by individuals	130
Not caused by Th. Co.	130
Transfers of Dec. 1919	150-2; 153; 204; 206; 207-8
Travis Glass Co.	
Assumption of liabilities	67
Bill of sale	66
Competition with Th. Co.	89
Licenses assigned	120
Location	102
Option on	30-31
Organization	89; 102
Request to dissolve	63
" " transfer	65
Stock bought	103
Stockholders meeting	63
Territory covered	89
Travis, H. E.	140
Turner, S. G. H.	218
Statement as to Th. Co. not assuming liability	
Uncertainty as to plan	121
Units	
Automatic	87-8
Complete	92
Winslow Gl. Co.	109; 120; 191

Withdrawal notices
  Copies 40-41
  By Libbey & Ford 113
  To Baldwin personally 129
  None to Th. Co. 129
Woodbury Glass Co.
  Business 90
  Ceased to make "milks" 188; 202
  Decided to stop milk production 188; 189
  Hartford-Fairmont machines 100; 109; 188-9; 193
  Illinois Co. orders 192-3; 195
  In bond mortgage 181; 184
  Letters to Illinois Co. 191-2; 193
  Location 102
  Machines obsolete 177; 183-4; 189
  Milk Bottles
    Contracts filled by Th. Co. 201-2
    " with Illinois Co. 192-3
    Competition with Essex Co. 191
    Deliveries on Illinois contract 192-3
    Discussed with Guar. Tr. Co. 171
    Excluded from H-P licenses 177; 178; 181; 193
    No contracts for 180
    Not producing Aug. 28, 1919 188; 202
    On hand Aug. 28, 1919 188
    Price; not affected by deal 200
    Policy of Dropping 197; 213-14
    Production 186
    " in 1918 189; 196
    " " 1919 189
    Quality on hand 188
    Sales 170-1; 188; 190; 194; 197
    Unknown to Baldwin 179-80; 185; 186
  Not dissolved 141-2
  Output 169; 195; 196
  Owned by Th. Co. 203
  Percentage of "milks" 196

Stock
Acquired by Th. Co. 156
Amount paid 157
Preferred 160
Voting 153
Total production 169; 195; 196
Ware 90; 194

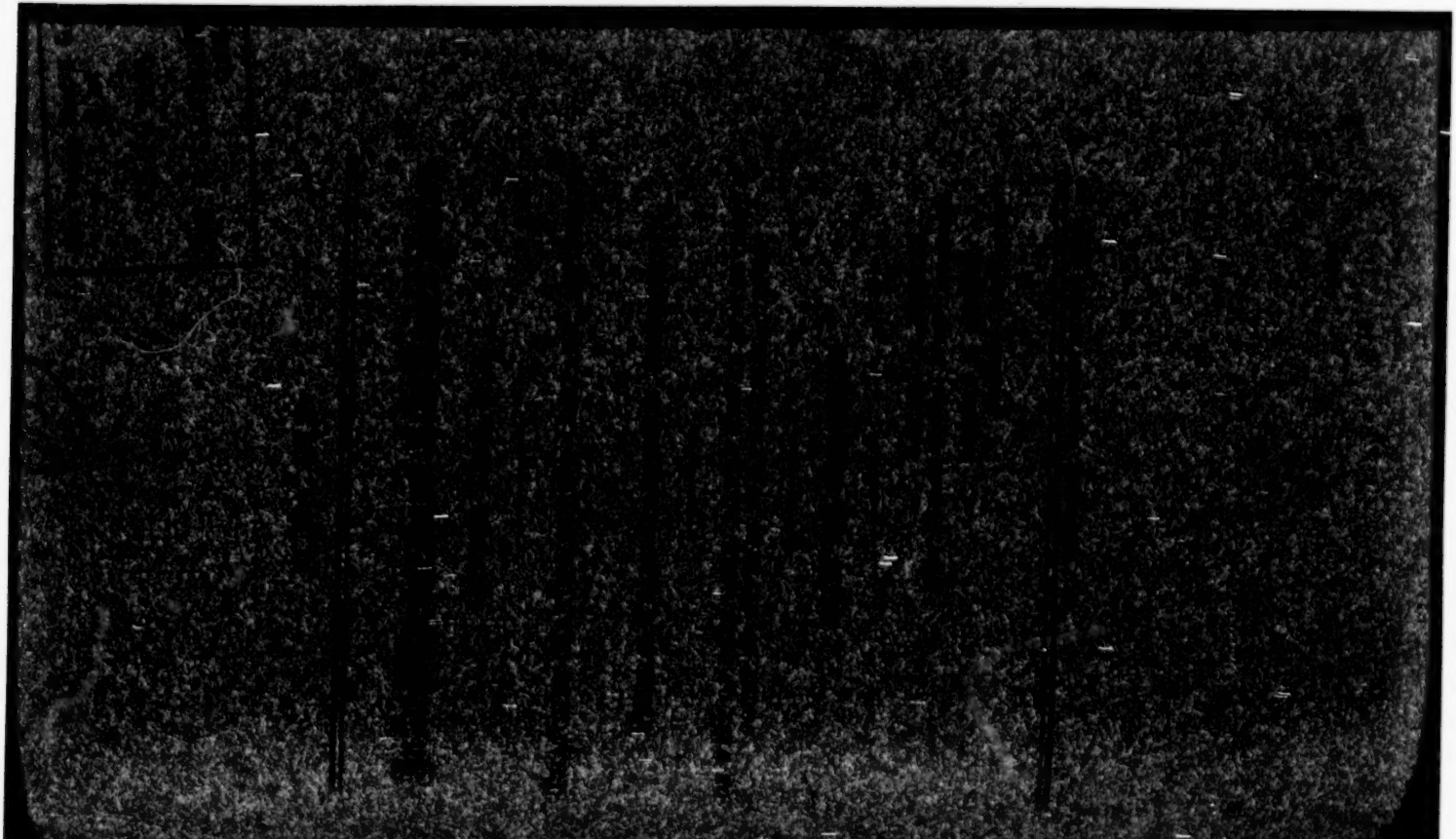


TABLE OF CONTENTS

	Page
Grounds of jurisdiction	1
Statement	2
The issues	4
The facts	4
1. Competition in interstate commerce in the milk-bottle business prior to the events which form the basis of this case	5
2. Principal transactions which constitute the basis of the case	8
3. Commerce of Thatcher, Essex, Travis, Lockport, and Woodbury Companies and competition between these companies prior to transactions herein recited	19
Summary of argument	21
Argument	23
I. The Thatcher Co. acquired, through its ownership of the stock of the Sterling Glass Co., the stocks of the Essex, Travis, Lockport, and Woodbury Companies which were purchased and owned by the Sterling Co	25
1. The purchase of the stock of the four companies was not a personal venture of Baldwin, Libbey, and Ford	33
2. By the contract of August 28, 1919, Thatcher Co. had the unconditional right to pay the notes and take up the stock	40
II. The acquisition of the stocks by Sterling Co. had the same legal effect as though the Thatcher Co. had directly acquired them	41
III. The Thatcher Co. directly acquired the stock of the four companies not later than June 4, 1920	44
IV. The acquisition by the Thatcher Co. of the stock of the four corporations eliminated competition between those companies and between the Thatcher Co. and those companies, restrained trade and tended to create a monopoly	44
V. The statute authorizes the commission to require the divestiture not only of the certificates of stock, but of the rights which were acquired when purchasing the share capital	46

Argument—Continued. Page

V. The statute authorizes the commission, etc.—Con.

1. The statute expressly confers authority upon the commission to require the divestiture of the rights which the certificates of stock represented when purchased 47

2. The power to make effective the divestiture of share capital by providing that the properties and other assets shall be included therewith, is necessary and by fair implication conferred .. 48

3. Cases cited by counsel for Thatcher Co. distinguished 51

VI. Section 7 was not intended to prevent only secret acquisitions of stock of competing corporations ... 53

VII. The Thatcher Co. can not take advantage of its own wrong by voting itself, for a nominal consideration, the assets and properties of the corporations whose stock it has illegally acquired 56

VIII. The Circuit Court of Appeals has jurisdiction to enter a decree affirming the order of the commission requiring the Thatcher Co. to divest itself of the share capital, assets, and properties 58

Appendix: Pertinent portions of Clayton Act 62

AUTHORITIES CITED

Aluminum Company v. *Federal Trade Commission*, 284 Fed. 401 .. 43

Blair v. *Chicago*, 201 U. S. 400 59

Broom, Legal Maxims (6 Am. Ed.), p. 212; Star, p. 275, and cases 57

Brown v. *Pennsylvania Railroad Co.*, 235 Fed. 669; 250 Fed. 513 42

Butterick Co. v. *Federal Trade Commission*, 4 F. 2nd 910 58

Clark on Corporations, 7th Ed., Vol. I, p. 55 47

Federal Trade Commission v. *Gratz*, 253 U. S. 421 2

James v. *Milwaukee*, 16 Wall. 159 59

Levy v. *Kansas City*, 168 Fed. 524, CCA Eighth Cir., and cases therein cited 57

Lewis' Sutherland on Statutory Construction, 2nd Ed., Vol. II, pp. 947–948 50

Little v. *Fleischman et al.*, 98 S. E. 455, 458 57

Patterson v. *United States*, 222 Fed. 625 46

Rhode Island v. *Massachusetts*, 12 Peters 657, 718 59

Silver Co. v. *Federal Trade Commission*, 292 Fed. 752 58

Standard Fashion Company v. *Magrane-Houston Co.*, 258 U. S. 346 55

Standard Oil and Tobacco Cases, 221 U. S. 1, 77, 78, 106, 184 .. 51

Swift & Co. v. *U. S.*, 196 U. S. 375, 394 46

United Shoe Machinery Corp. et al. v. *United States*, 258 U. S. 451, 455; 234 Fed. 127 ..... 5, 55

	Page
U. S. v. *Dupont Powder Co.*, 188 Fed. 127, 145	46
United States v. *Milwaukee Refrigerator Transit Co. et al.*, 142 Fed. 247	43
United States v. *New England Fish Exchange et al.*, 258 Fed. 732	43
U. S. v. *Reading Co. et al.*, 226 Fed. 229	46
Venner v. *Great N. Ry.*, 209 U. S. 24	59
Western Meat Co. v. *Federal Trade Commission*, 1 Fed. 2nd, 95; Id. 4 Fed. 2nd, 223	49, 60
Bouvier 3rd Revision 802	59

STATUTES CITED

Clayton Act, 38 Stat. 730	1, 62
Judicial Code, as amended by the act of February 13, 1925	2

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 213

THATCHER MANUFACTURING COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court below is found in 5 Fed. (2nd) 615. It also appears at pp. 317–334 of the printed transcript.

GROUNDS OF JURISDICTION

This was a petition by the Federal Trade Commission (hereinafter called the Commission) to the Circuit Court of Appeals for the 3rd Circuit to enforce an order of the Commission entered under authority of Sections 7 and 11 of "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes," popularly known as "the Clayton Act" (38 Stat. 730). The jurisdiction of the Court below was invoked under Section 11 of that Act.

The Court below on April 16, 1925, entered a decree affirming paragraphs 1 and 3 and setting aside paragraph 2 of the Commission's order (R. 299–300); on June 2, 1925, denied the petition of the Thatcher Manufacturing Company, hereinafter called the Thatcher Company, for rehearing (R. 340); and on June 12, 1925, denied a motion of the Commission to re-form the decree (R. 340).

Jurisdiction of this Court is invoked under Section 11 of the Clayton Act (38 Stat. 730) and under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (*Federal Trade Commission* v. *Gratz,* 253 U. S. 421).

STATEMENT

This case comes to this Court on a writ of certiorari to review a judgment of the Circuit Court of Appeals for the 3rd Circuit, which affirmed in part an order of the Commission entered against the Thatcher Company, requiring it to divest itself of the share capital and physical properties and assets of certain corporations which the Commission found had been acquired in violation of Section 7 of the Clayton Act. The order of the Commission as affirmed below required the petitioner to—

> 1. Cease and desist from the ownership, operation, management, and control of the assets, plants, properties, rights, and privileges which were at the time of their acqui-

sition in the ownership, possession, management, and control of the Essex Glass Company, the Travis Glass Company, and the Lockport Glass Company, together with all improvements and additions made to such assets, plants, and properties up to the date of this order, which are hereby declared to have been acquired and are now held in violation of law or as a result thereof; and

2. Divest itself of all capital stock of the Woodbury Glass Company now held and owned by it, and all right, title, interest, and claim therein, which said stock is hereby declared to have been acquired and is now held in violation of law or as a result thereof; and

3. Submit within three months from the date of this order, for approval by the commission, a plan for the performance by the respondent of the terms of this order, jurisdiction for this purpose being hereby retained. (R. 249–250.)

The Thatcher Company declining to obey the order, the Commission applied to the Court for its enforcement.

The Court below affirmed the order with respect to the Essex, Travis, and Lockport companies, but set it aside with respect to the Woodbury Company, holding that the number of milk bottles manufactured by the company was so inconsiderable that the lessening of the competition resulting from the purchase of its stock was not substantial. (R. 298–299.)

THE ISSUES

Counsel for the Thatcher Company makes but two contentions in his brief: First, that the Thatcher Company did not acquire directly or indirectly the share capital of the four companies which it is charged in the complaint with acquiring; and, second, that if the Thatcher Company did acquire the share capital of the four companies it purchased also the physical properties, assets, and good will of three of them, and that the Clayton Act does not confer upon the Commission any authority to compel the company to divest itself of these properties and assets. While these are the issues presented in the brief for the Thatcher Company, and the brief for the Commission will be devoted chiefly to a discussion of them, brief reference is made to other points which it is deemed necessary to establish in order to show a violation of Section 7 of the Clayton Act.

THE FACTS

The Commission's Findings as to the Facts appear on pp. 232–249 of the Record. The Trade Commission Act provides that these findings shall be conclusive if supported by evidence. The Court below held:

> The order was made on elaborate findings of fact based mainly on a stipulation as to facts entered into by the parties and on other matters obtained from records which the respondent freely opened and made available. There is therefore little dispute about the

facts and no trouble in deciding that the Commission's findings are, except in one matter, sustained by the evidence. (R. 318.)

The finding of the Court below is entitled to the presumption of correctness which is given to the conclusions of a court after careful consideration of the record. (*United States* v. *United Shoe Machinery Company*, 258 U. S. 451, 455.) The single matter referred to by the Court as not supported was the finding that the acquisition by the Thatcher Company of the stock of the Woodbury Company substantially lessened competition between the latter company, the Thatcher Company and the other companies whose stock it acquired. (R. 334.)

The findings recite a chronological history of the transactions which constitute this case, and this statement of facts must be largely a résumé of those findings. The evidence consists of the testimony of five witnesses and a stipulation of facts to which exhibits numbered A to Z–10, inclusive, are attached.

1. Competition in interstate commerce in the milk-bottle business prior to the events which form the basis of this case

Glass bottles were originally made by hand process. This consisted in providing a large tank of molten glass from which a sufficient portion was removed to make a bottle of the desired size. This was originally done by a man with an instrument or

tool called a blow-pipe. This portion of molten glass when removed from the tank was placed in an iron mold where air pressure was used to expand the molten glass to the size of the mold. This latter process was what is known as "blowing." The process, therefore, consisted of melting glass, removing it from the tanks to the mold, and the blowing of the glass to fill the mold, thus making the bottle. (R. 117–118.)

By the Spring of 1919, two automatic bottle-making machines, each operated as a single unit and performing both of the operations above described, had been patented. (R. 92.) The first of these machines appeared some time between 1900 and 1903, and was known as the Owens Machine. The patent was owned or controlled by the Owens Bottle Company, one of the largest, if not the largest, bottle-manufacturing concerns in the United States. The Owens Company in 1905 granted to the Thatcher Company an exclusive license to use the Owens bottle-making machine for the manufacture of *milk* bottles in the United States. (R. 87–88.)

In 1917 the other patented automatic bottle-making machine operating as a single unit appeared. This was known as the Hartford-Fairmont Machine and was owned by the Hartford-Fairmont Company. (R. 90, 91.) This company licensed four companies—the Essex Glass Company, the Travis Glass Company, the Lockport Glass Com-

pany, and the J. T. & A. Hamilton Company—to use this machine in the United States in the manufacture of milk bottles, each of these licenses providing that only the four companies named would be licensed to use this machine in the manufacture of milk bottles. (R. 91, 120.) Thus it appears that the Thatcher Company had the exclusive right to use the Owens Machine in the manufacture of milk bottles, and the four companies last above named had together the exclusive right to use the Hartford-Fairmont Machine for making milk bottles. While there were other machines which could be used to gather the molten glass from the tank, and still others which performed the forming function, these machines could not be operated as economically as either the Owens or Hartford-Fairmont Machines. (R. 91, 119.) It is proved in this case that the Thatcher Company with the use of the Hartford-Fairmont Machine could manufacture milk bottles at a cost of 50¢ per gross less than it could even with the Owens Machine. (R. 43, 117.)

At the time when the events which form the basis of this suit transpired, the Thatcher Company was manufacturing approximately 40% of the milk bottles made and sold in the United States. The four companies licensed to use the Hartford-Fairmont Machine were manufacturing more than 30% of the milk bottles made and sold in the United States. The purchase by the Thatcher Company of the stock of the Essex, Travis, and Lockport companies and of the milk-bottle business and

license of the J. T. & A. Hamilton Company, which is the basis of this proceeding, placed in a single control from 70 to 90% of the interstate commerce in milk bottles in the United States and the right to use in the manufacture of such bottles the only two effective, complete bottle-making machines.

The Woodbury Glass Company was engaged in the manufacture primarily of whiskey bottles, but was also manufacturing milk bottles to a substantial extent by hand processes and selling the same in interstate commerce. (Infra, p. 19.) It had a nonexclusive license to use the Hartford-Fairmont Machine in the manufacture of condiment bottles, whiskey bottles, etc. The stock of this company was also acquired by the Thatcher Company and in the same transaction by which, it is claimed by the Commission, the stock of the Essex, Travis, and Lockport companies was acquired. (Infra, p. 19.)

2. Principal transactions which constitute the basis of the case

On August 28, 1919, the Thatcher Company, the Essex Glass Company, Travis Glass Company, and Lockport Glass Company were engaged in manufacturing milk bottles and in selling such bottles in interstate commerce in competition with each other. (R. 87, 88, 89.) Woodbury Glass Company was engaged in manufacturing bottles of various kinds, principally whisky bottles, but was also manufacturing milk bottles to some extent and selling them in interstate commerce. (R. 169, 170, 172, 177, 231.)

In the early part of 1919 I. T. Axton, president of, and controlling stockholder in, the Woodbury Glass Company, held options at prices therein named on the capital stock of Essex Glass Company, Travis Class Company, and Lockport Glass Company, and an option on the Hartford-Fairmont machine and license and milk-bottle business of the J. T. & A. Hamilton Company. (R. 167.) In the summer of 1919, failing to merge the companies, Axton, shortly before his options expired, approached F. E. Baldwin, president of the Thatcher Company, and suggested that his options be exercised by the Thatcher Company or by Baldwin and associates. (R. 168.) Baldwin consulted with H. C. Mandeville, a director and general counsel of the Thatcher Company, and with E. D. Libbey, president of the Owens Bottle Company, the licensor of Owens bottle-making machines to the Thatcher Company. (R. 43, 93.) Owens Bottle Company offered no objection to the contemplated acquisition, but advised the Thatcher Company to purchase the companies and acquire the exclusive rights to the Hartford-Fairmont machines for manufacturing milk bottles. (R. 43.) Libbey agreed to assist in securing the necessary money and also to go into the deal provided he could acquire the Hartford-Fairmont patents. (R. 199.) The consultations and negotiations between Baldwin, Mandeville, and Libbey resulted in the conclusion by them to exercise the options held by Axton and acquire

the stock of Essex Glass Company, Travis Glass Company, Lockport Glass Company, and Woodbury Glass Company, and the milk-bottle business, license, and machine of the J. T. & A. Hamilton Company. (R. 134.) The options held by Axton expired September 1, 1919 (Exhibits A, B, C, D, E, R. pp. 30–34), and the conclusion to exercise the options was reached in August, 1919. (R. 144.) The remaining option time was short, and if the desired rights were to be secured a quick accomplishment was essential.

The first formal act in the plan was made when Mandeville incorporated Sterling Glass Company on August 23, 1919, with an authorized capital of $600,000, of which $500,000 was issued at par for cash, the Thatcher Company and Libbey each contributing $250,000 and taking one-half the stock. (R. 95.) On August 27 and 28 Axton assembled the stockholders of Essex Glass Company, Travis Glass Company, Lockport Glass Company, and Woodbury Glass Company, in New York City, at the offices of the Guaranty Trust Company. (R. 94, 173, 174.) On the same date Baldwin, the president of the Thatcher Company; Mandeville, a director and its general counsel; Libbey, president of Owens Bottle Company; and Ford, a friend of Libbey and a large stockholder in the Owens Bottle Company, met in another part of the same offices. (R. 96.) Representatives of the Guaranty Trust Company acted as intermediaries between the two assemblies. (R. 134, 135.)

On August 28, 1919, Baldwin, Libbey, and Ford, on behalf of Sterling Glass Company (R. 94), executed their three separate promissory notes to the Guaranty Trust Company for a total of $1,510,000, and each indorsed the notes of the other two so that they were equally liable on all three notes (R. 94, 95). The proceeds of these notes and the $500,000 of Sterling Glass Company were deposited in the Guaranty Trust Company (Exhibit H, R. 38–39) and used by Sterling Company, on August 28, 1919, to acquire all of the stock or share capital of Essex Glass Company, Travis Glass Company, and Lockport Glass Company, all the common capital stock of Woodbury Glass Company, and the license, machine, and milk-bottle business of the J. T. & A. Hamilton Company. (R. 95, 96, 113, 134, 135.) The stock certificates held by the various stockholders in the several companies were indorsed in blank by the respective vendors, and held by the Guaranty Trust Company as collateral security for the three notes of Baldwin, Libbey, and Ford. (R. 96, 113.) The transaction with the J. T. & A. Hamilton Company included no stock or share capital, but was an outright purchase and sale of the license, machine, and milk-bottle business of the J. T. & A. Hamilton Company, and such rights and properties were transferred directly to the Thatcher Company alone. (Exhibit H, R. 40, 97, 148.)

Immediately after the stock of the four companies was acquired, Baldwin, president of the

Thatcher Company, requested the officers of the four companies to remain in their respective positions and continue the operation of the companies until further direction. (R. 175.) The written resignations of all officers of the four companies were taken by Baldwin to be exercised at his option. (R. 39, 142, 175.)

On the same day, August 28, 1919, Baldwin, Libbey, Ford, and Sterling Glass Company made a written agreement which described the three notes and the collateral held therefor, and certain rights and obligations of the parties. (Exhibit G, R. 36–38, 96.) That agreement stated that the purpose of the parties was, at a later date, to organize a permanent company to take over the assets of the four companies and also the Thatcher Company, and recited that Libbey entered the agreement in contemplation of the purchase by him of the Hartford-Fairmont patents. The parties agreed that the stock just acquired should be held together and not sold by any of the parties without the consent of the others, and that Ford and Libbey might retire from the transaction and from Sterling company at their option. The contract also provided, among other things:

> (a) That Sterling Glass Company assumed all liability of the other parties upon the three notes of Baldwin, Libbey, and Ford and guaranteed the other parties against liability on said notes, and that "upon the payment of the said notes all of the collateral

thereto shall become the property of Sterling Company."

(b) That Libbey and Ford might wholly retire from Sterling Company and from the transaction at their option.

(c) That upon withdrawal of Libbey and Ford, Baldwin would assume all their liability and relieve them from liability on the notes, and Libbey would be repaid the $250,000 contributed by him to the capital stock of Sterling Company.

(d) That upon the repayment of said moneys and release from indorsements and liability, Ford and Libbey would release to Baldwin all interest in the stock of Sterling Company and transfer the same to Baldwin's nominee, and Baldwin might proceed with the organization of such permanent company and with the disposition of Sterling Company and its assets as he saw fit.

Libbey failed to acquire the Hartford-Fairmont patents. (R. 112, 136, 144.) Separate written notices of their desire to retire from the transaction and be released from further liability were addressed by Libbey and Ford to Baldwin and the Thatcher Company under date of December 11, 1919. (Exhibits I and J, R. 40–41.) Libbey's stock in Sterling Glass Company was transferred of record to the Thatcher Company on June 4, 1920 (R. 158, 159), and on June 7, 1920, the Thatcher Company paid Libbey $261,750 for his stock and interest on the money paid for it. (R. 162,

163.) The notes to the Guaranty Trust Company, whereon Libbey and Ford were makers and indorsers, remained unchanged and undischarged until paid by the Thatcher Company on July 3, 1920. (R. 153.)

To finance the indebtedness under the notes to the Guaranty Trust Company, an agreement was made on April 10, 1920, by Baldwin with certain bond buyers of New York City, by which it was provided that the Thatcher Company increase its capital stock $625,000 and issue $2,000,000 of 7% gold bonds, which the bond buyers agreed to purchase. In that agreement Baldwin is called the "Seller," the bond buyers are called the "Buyers," and the Thatcher Company is referred to as the "Corporation."

The Thatcher Company's capital was increased accordingly. (R. 137.) On April 12, 1920, the stockholders of the Thatcher Company authorized an increase in its capital stock as stipulated. (Exhibit M, R. 53.) The additional stock in the Thatcher Company was issued for cash, and from the proceeds thereof the Thatcher Company paid Libbey $261,750 on June 7, 1920, for the sum paid by Libbey for capital stock of Sterling Glass Company, with interest thereon. (R. 138, 162, 163.) On June 3, 1920, a special meeting of the directors of the Thatcher Company directed the proper officers of the Thatcher Company to acquire Libbey's 2,500 shares of stock of Sterling Company for $250,000 with interest from August 27, 1919. (Ex-

hibit Q, R. p. 59.) Before Libbey was paid, the stock in his name was transferred of record to the Thatcher Company on June 4, 1920 (R. 158), and thereupon the Thatcher Company became the record owner of all the stock of Sterling Glass Company, except the eight shares issued in the names of its agents or employees (R. 159). On June 3, 1920, before Libbey's stock was transferred of record or paid for by the Thatcher Company, a written notice to Sterling Glass Company and its board of directors was given by the Thatcher Company and its agents or employees who held certain qualifying shares, reciting that all the stock of Sterling Glass Company had been acquired by the persons whose names were signed to the notice, and that they were desirous of having Sterling Glass Company dissolved and its property transferred to respondent. (Exhibit N, R. 54.) Thereupon Sterling Glass Company, by Mandeville, executed a bill of sale on June 7, 1920, conveying to the Thatcher Company all the property of Sterling Glass Company, including specifically the contract of August 28, 1919, and all rights and interests therein. (Exhibit P, R. 58.)

On June 7, Baldwin, Mandeville, Collins, and Niver, with the other persons holding qualifying directors' shares, addressed separate communications to Essex Glass Company, Travis Glass Company, and Lockport Glass Company, and their boards of directors, stating that they had acquired all the stock of such companies and desired to have

the companies dissolved and to have all property belonging to such companies transferred to respondent. (Exhibits S, T, X, Z–3.) Thereupon Baldwin, Mandeville, Collins, and Niver, as stockholders and directors of the respective companies, on June 11, 12, and 24, 1920, respectively, passed resolutions on behalf of each company providing for the transfer of the assets of Essex, Travis, and Lockport companies to the Thatcher Company and for the dissolution of such companies. (Exhibits T, Y, Z–4.) The deed and bill of sale from Essex Glass Company is dated June 17, 1920. The deeds and bills of sale from Travis Glass Company and Lockport Glass Company are dated June 25, 1920. Each deed and bill of sale was signed by Baldwin and Collins as president and secretary, respectively, of Essex, Travis, and Lockport companies, and recited a consideration of one dollar and other valuable considerations. (Exhibits V, Z–1, Z–6.)

In the meantime the bond issue provided for in the contract of April 10, 1920, was being accomplished. The Thatcher Company executed a mortgage or deed of trust conveying all its property and the properties of Essex Glass Company, Travis Glass Company, and the Lockport Glass Company, and the common stock of Woodbury Glass Company to the Guaranty Trust Company as trustees. The bonds to be secured by such mortgage or deed of trust were drawn and signed and dated April 1, 1920.

On July 3, 1920, Baldwin and Mandeville, representing the Thatcher Company, met the representatives of the bond buyers at the Guaranty Trust Company in New York City. (R. 160.) The bonds and the mortgage or deed of the Thatcher Company and the deeds and bills of sale from Essex Glass Company, Travis Glass Company, and Lockport Glass Company were produced and delivered to the bond buyers and took effect upon delivery. (R. 155–225.) The bond buyers thereupon delivered the proceeds of the bonds to the Guaranty Trust Company, and such proceeds were deposited in the Guaranty Trust Company to the credit of the Thatcher Company. (R. 160, 163.) Baldwin, as president of the Thatcher Company, drew a check in favor of the Guaranty Trust Company on that deposit for $1,634,955, in payment of the three notes of Baldwin, Libbey, and Ford, and interest thereon. (R. 143, 163.) The check was honored by the Guaranty Trust Company, and the three notes were marked "paid" and delivered to Baldwin and Mandeville (R. 153, 154), together with the certificates of stock of Essex Glass Company, Travis Glass Company, and the Lockport Glass Company held as collateral security therefor. The certificates for the common stock of the Woodbury Glass Company were retained by the Guaranty Trust Company under the terms of the mortgage or deed of trust. (R. 226–231.) The mortgage or deed of trust from the

Thatcher Company to the trustee and the deeds from Essex, Travis, and Lockport companies to the Thatcher Company were placed of record by the trustee. (R. 225.) The delivery of the deeds, mortgage or deed of trust, notes, and certificates of stock and the payment of the notes occurred contemporaneously and constituted one transaction. (R. 160, 225.)

In compliance with notices, requests, and resolutions of Baldwin, Mandeville, Collins, and Niver, and the other stockholders and directors holding qualifying shares, the dissolution of Essex Glass Company, Travis Glass Company, Lockport Glass Company, and Sterling Glass Company was accomplished. (R. 221.)

Sterling Glass Company was dissolved September 9, 1920. Lockport Glass Company was dissolved October 20, 1920. Essex Glass Company was dissolved December 18, 1920. Travis Glass Company was dissolved January 13, 1921. The contract of April 10, 1920, between Baldwin and the bond buyers provided that the bonds to be issued thereunder might be called on the terms and conditions and at the premium therein named. The bonds have been called and redeemed, and the mortgage or deed of trust has been canceled. (R. 184, 185.) The Thatcher Company now holds its properties and the properties of Essex Glass Company, Travis Glass Company, and the Lockport Glass Company, and the common capital stock of Woodbury Glass Company free from the lien or encum-

brance of such mortgage or deed of trust. (R. 226.) The Essex, Travis, and Lockport companies have been dissolved. The Woodbury Glass Company is still engaged in commerce, and all its common capital stock is owned by the Thatcher Company. (R. 203.) The Thatcher Company acquired the stock of Woodbury Glass Company through the transaction at the Guaranty Trust Company on August 28, 1919, and the subsequent proceedings. (R. 156.)

7. COMMERCE OF THATCHER, ESSEX, TRAVIS, LOCKPORT, AND WOODBURY COMPANIES, AND COMPETITION BETWEEN THESE COMPANIES PRIOR TO TRANSACTIONS HEREIN RECITED

In 1919 the Travis, Essex, and Lockport companies were engaged in the manufacture and in the sale generally in interstate commerce of milk bottles. The Travis Company sold generally throughout the United States, the Essex Company and the Lockport Company sold principally in the Central West and in the East (R. 89-90); but all of these companies sold to some extent throughout the United States (R. 229). All were in competition with each other in the sale of milk bottles in interstate commerce and in competition with the Thatcher Company in such commerce. (R. 89-90.)

The Woodbury Glass Company sold a substantial quantity of milk bottles in interstate commerce in 1919 up to August 28th of that year (R. 193), and at that time had contracts outstanding for the sale

and delivery of milk bottles in interstate commerce (R. 188–192). After August, 1919, its outstanding contracts for milk bottles were filled by the Thatcher Company. (R. 201–203.)

In August, 1919, upon the purchase by the Sterling Company of the stocks of the Essex, Travis, Lockport, and Woodbury companies, the Thatcher Company, through Baldwin, took over the conduct of their businesses and carried it on under the existing management until January 1, 1920, when the Thatcher Company brought the management of the four companies to Elmira, N. Y., and there managed and directed the businesses from its Elmira office. (R. 43, Ex. K.)

From the time the Thatcher Company acquired through the Sterling Company the stock of these four companies all competition between the several companies and the Thatcher Company ceased. (R. 21, par. 16; R. 77, 89, 90, 114–116.)

The Woodbury Company has not manufactured milk bottles since August 28, 1919, and since that date there has been no competition between it and the Essex, Travis, or Lockport companies or the Thatcher Company. (R. 194.)

In August, 1919, the Thatcher Company was producing about 40% of all the milk bottles produced in the United States. (R. 105.) In 1920 it produced over 70% of all the milk bottles produced in the United States. (R. 106.) In a letter dated April 23, 1920, Baldwin made the following state-

ment to the purchasers of the bonds issued by the Thatcher Company:

> Thatcher Manufacturing Company will have the exclusive right to make milk bottles by the only successful bottle-making machines devised and will manufacture and sell about 90% of all the milk bottles manufactured in the United States. (R. 80.)

The Thatcher Company is now the largest producer of milk bottles in the United States, producing more milk bottles than all other manufacturers combined. (R. 221.) This was brought about by the transactions stated.

SUMMARY OF ARGUMENT

1. The Thatcher Company, through its ownership first of 50% and later of 100% of the stock of the Sterling Glass Company, indirectly acquired the stock of the Essex, Travis, Lockport, and Woodbury Companies, and so directed the management of these four companies as to eliminate all competition between these companies and between them and the Thatcher Company. The Thatcher Company, by transfer and assignment to it of all rights and properties of all kinds of the Sterling Company, acquired directly the stocks of the four corporations named before the transfer to it of the properties of the Essex, Travis, and Lockport companies.

2. The Thatcher Company did not avoid the prohibition of the statute by creating the Sterling

Company, whose stock it owned, to purchase the stock of the Essex, Travis, Lockport, and Woodbury companies. The purchase of the stocks of these four companies by the Sterling Company, created by the Thatcher Company for that purpose, was an "indirect" acquisition of such stock by the Thatcher Company, and was as much in violation of the statute as if the Thatcher Company had purchased the stock of the four companies direct

3. The acquisition by the Thatcher Company of the stock of the four companies named eliminated competition between these companies and between them and the Thatcher Company, restrained trade, and tended to create a monopoly.

4. The statute authorizes the Commission to require a corporation illegally purchasing the stock of competing corporations to cease and desist from the violation of law and to divest itself of the stock so held in the manner and within the time fixed by the Commission. This direction as to divestiture of stock means to dispose of the rights in the corporation which constitute the stock—not of mere pieces of paper which represent nothing. If the word "stock" be not thus construed, still the express authority conferred upon the Commission to require the divestiture of the stock carries with it by implication whatever authority is necessary to make an effective order of divestiture.

The statute is remedial and should be liberally construed to effectuate the purpose of Congress.

The Thatcher Company can not take advantage of its own wrong and, by voting itself for a nominal consideration the assets and properties of the corporation, defeat the Act.

5. Section 7 of the Clayton Act was not intended to prohibit only the secret purchase and holding of stock—the operation of bogus independents. There is no word in the statute which indicates any such intention. The remedy provided—divestiture of stock—demonstrates that this was not its purpose. The hearing provided by the statute would necessarily make public the facts, and continued holding of the stock would cease to be illegal. The argument might have been tenable if the statute had been penal.

6. The jurisdiction of the various circuit courts of appeal under the Act is original. The statute confers "jurisdiction" of the proceeding and power to enter a "decree" affirming, modifying, or setting aside the order of the Commission. These courts have full jurisdiction to enter a decree upon the record which will effectuate the divestiture of stock directed by the Act, including the properties.

ARGUMENT

The first two paragraphs of Section 7 of the Clayton Act are as follows:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce where the effect of such ac-

> quisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
>
> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

The elements of the offense denounced by the statute are: (1) the acquisition, directly or indirectly, by a corporation engaged in interstate commerce of the whole or any part of the capital stock of another corporation engaged in interstate commerce, or the acquisition by a corporation whether engaged in interstate commerce or not of the whole or any part of the capital stock of two or more corporations engaged in interstate commerce; (2) that the effect of the acquisition may be: (*a*) to substantially lessen competition between the companies, or any of them; (*b*) to restrain trade in any section or community; or (*c*) to tend to create a monopoly.

The first element to be proven in this case, then, is the acquisition, directly or indirectly, by the Thatcher Company of the stock of the Essex, Travis, Lockport, and Woodbury companies. On this point we contend that on August 28, 1919, the Thatcher Company acquired indirectly, through its ownership of 50% of the stock of the Sterling Company, the share capital of the Essex, Travis, Lockport, and Woodbury companies, that by acquiring the stock of Libbey in the Sterling Company it acquired all of the capital stock of the four companies, and that by the transfer on June 7, 1920, of the assets and properties of the Sterling Company, including its rights under the contract of August 29, 1919, the Thatcher Company acquired directly the whole of the capital stock of the four companies. True it is that at this time there was a loan to be discharged at the Guaranty Trust Company to secure which the stock had been deposited, but the Thatcher Company nevertheless owned the stock.

I

The Thatcher Company acquired, through its ownership of the stock of the Sterling Glass Company, the stocks of the Essex, Travis, Lockport, and Woodbury companies which were purchased and owned by the Sterling Company

The Court below, without tracing the devolution of title through the entire transactions, found that the Thatcher Company acquired the share capital of the Essex, Travis, Lockport, and Woodbury com-

panies in violation of law. The Court found that on August 28, 1919, certain unnamed owners of the stocks parted with title to them to the Sterling Company, the stock being paid for in part by the proceeds of sale of the capital stock of the Sterling Company; and that ultimately the Thatcher Company paid with its own money the notes, by which the remainder of the purchase price had been raised (the Thatcher Company's). (R. 328–330.)

The facts in this record are inconsistent with any conclusion other than that the Sterling Glass Company purchased the stock of the Essex, Travis, Lockport, and Woodbury companies and owned it until it passed directly to the Thatcher Company, together with the right to pay the notes and take up the collateral by the assignment of the Sterling Company to the Thatcher Company on June 7, 1920, of the contract of August 29, 1919. The facts and circumstances proving this may be summarized as follows:

The Sterling Company purchased from Axton the options on the stock of the four corporations, paying to Axton $100,000 for these options and for services rendered by Axton in connection with this transaction. (R. 40.) Axton's agreement was made with the Sterling Company (R. 179), and the payment of the money was guaranteed by the Thatcher Company (R. 40), not by Baldwin, Libbey, and Ford. It was by the exercise of these options, owned and paid for by the Sterling Company,

that the stock of the four corporations was purchased on August 28–29, 1919.

The proceeds of the notes of Baldwin, Libbey, and Ford were deposited in the Guaranty Trust Company to the credit of the Sterling Company (R. pp. 38–39, 149), together with $50,000 realized from the sale of stock of the Sterling Company. (R. 39.)

The Guaranty Trust Company's commission of $24,000 on the transaction was a debt of the Sterling Company (R. 39), and apparently other expenses of the transaction were an obligation of the Sterling Company (R. 164).

By the contract of August 29, 1919 (R. 36), the Sterling Company assumed all liability on the notes of Baldwin, Libbey, and Ford, and took the absolute right to take over the collateral on payment of the notes (R. 37, 58, 227). This contract provided also that upon payment of $250,000 to Libbey and release of the liability of himself and Ford on the notes, these parties would release to Baldwin not any interest in the stocks of the four companies, but all interest in the stock of the Sterling Company. While we contend that the company purchased and owned the stock which was deposited as collateral, nevertheless this contract determined its right as against the three individuals named to pay the notes and take up the collateral. This contract was not, as we will show later (post, p. 40), alternative in its nature, as contended for by counsel for petitioner.

All legal rights of the Sterling Company under this contract passed to the Thatcher Company direct by the bill of sale and assignment executed by the Sterling Company on June 7, 1920 (R. 58), and the subsequent action of the Thatcher Company in paying the notes and taking up the collateral was under the rights acquired under this contract and by the purchase of the stock of Sterling Company. The Thatcher Company had, on the third day of June, 1920, just four days prior thereto, authorized the purchase of Libbey's stock in the Sterling Company (R. 59), which purchase was consummated on the following day (R. 159), thus securing for the Thatcher Company all of the stock of the Sterling Company. On the 3rd of June the Thatcher Company notified the Sterling Company that it desired all of its property and assets, including the rights under this contract of August 29, 1919, transferred to the Thatcher Company. (R. 54.) Notices to the three companies, Essex, Travis, and Lockport, of the acquisition of all of their stock by Baldwin and his associates, and that the Thatcher Company desired to have all of their properties and assets transferred to it, were sent out on June 7th. (R. 63, 67, 72.) Thus, by securing *all* of the stock of the Sterling Company and the transfer of the company's property and rights under the contract of August 29, 1919, the Thatcher Company came into the direct ownership of the collateral.

Unless the Thatcher Company owned the stocks of the Essex, Travis, and Lockport companies, how is it possible to account for the transfer by these companies of all their properties and assets, amounting in value to hundreds of thousands of dollars, to the Thatcher Company for the nominal consideration of $1 some days before the day (July 3, 1920) when the notes were paid by it and the stock taken up?

If Libbey and Ford had any interest in the stock of the four companies, they still have that interest. They have not conveyed or assigned it. If Sterling Glass Company did not acquire the stocks of the four companies on August 28, 1919, and if Baldwin, Libbey, and Ford did acquire the stocks of the four companies on that day, the dissolution of the Essex, Travis, and Lockport companies was invalid. Libbey and Ford have not conveyed any rights which they acquired on August 28, 1919.

The acts and admissions of Baldwin and of the Thatcher Company up to June 7, 1920, are inconsistent with the ownership of these stocks by anyone other than the Sterling Company, and show that the latter company was controlled in fact by the Thatcher Company and its president, Baldwin, and its general counsel, Mandeville.

Immediately upon the purchase of the stocks of the four companies, the direction of their businesses was taken over by Baldwin and they were, after

January 1, 1920, managed from the offices of the Thatcher Company. (R. 43, 115.)

The Thatcher Company made substantial advances of money to the Travis Company, October 27, 1919, to the Woodbury Company in September, 1919, and to the Sterling Glass Company from August 27 to December 31, 1919. (R. 161.) It also received $75,000 from the Essex Company on December 31, 1919, which sum appears to have been treated as funds of the Thatcher Company. (R. 161, 162.) The money advanced to the Sterling, Travis, and Woodbury companies by the Thatcher Company was not evidenced by any note or other evidence of indebtedness, nor was the money received by the Thatcher Company from the Essex Company so secured.

Baldwin's annual report to the directors and stockholders of the Thatcher Company for 1919 stated:

> Upon the 29th day of August (1919) *we* purchased the capital stock of the companies named (Essex, Travis, Lockport, and Woodbury) and the Hartford-Fairmont feeder and machine and milk-bottle business of the J. T. & A. Hamilton Company. (R. 43.)

Baldwin in his testimony states that in using the word "we" he referred to the Sterling Company. (R. 112.)

The accounting methods of the four companies were to be put on the same basis as those of the Thatcher Company as soon as possible after the

purchase of the stocks by the Sterling Company. (R. 39.)

The Hamilton Company's license to use one of the Hartford-Fairmont patented feeders, this feeding machine, and the milk-bottle business of the Hamilton Company passed to the Thatcher Company by the transaction of August 28, 1919 (R. 148-149), by which the stock of the four companies also passed. As a part of this sale, the Hamilton Company's stockholders contracted to stay out of the milk-bottle business, except in Allegheny County, Pennsylvania, for a period of 10 years from January 1, 1920. This covenant, it will be seen, was with the Thatcher Company.

Neither Baldwin, Libbey, nor Ford asserted any claim to the Hamilton rights and properties, yet these properties were acquired with a part of the funds which the Thatcher Company now asserts enabled Baldwin, Libbey, and Ford to acquire individually the stocks of the Essex, Travis, Lockport, and Woodbury companies.

The agreement between Baldwin and the Bond Company which purchased the bonds issued by the Thatcher Company to take up the notes of Baldwin, Libbey, and Ford and the stock deposited as collateral, recited that the stock of the Essex, Lockport, Travis, and Woodbury companies was owned by the Sterling Company. (R. 47.) This agreement also refers to the Essex, Travis, Lockport, and Woodbury companies as "subsidiaries" of the Thatcher Company.

The statement of Baldwin that the Sterling Company owned the stocks of the four companies, the acquisition by the Thatcher Company of the stock in the Sterling Company owned by Libbey, thus putting the ownership of the entire stock of the Sterling Company in the Thatcher Company, and the taking of the logical and proper steps to transfer the property and assets of the Sterling Company, including its rights under the contract of August 28, 1919, to the Thatcher Company before making any effort to transfer the properties of the four companies from that company to the Thatcher Company—all this shows conclusively that Baldwin, Mandeville, and their associates treated the stock of these four companies as the property of the Sterling Company.

We think it is apparent from these facts that the Thatcher Company on August 28, 1919, indirectly acquired the stock of the four companies through its ownership of 50% of the stock of the Sterling Company. The Thatcher Company became the practical owner of *all* the stock of the Sterling Company on December 11, 1919, when formal notice was served upon it by Libbey and Ford that they would retire from the transaction. (R. 40–41.) Under the terms of the contract of August 29, 1919, upon receipt of such notice, the agreement to purchase Libbey's stock in the Sterling Company became operative. So that at least as early as December 11, 1919, the right to take over Libbey's stock in the Sterling Company accrued. As a matter of fact,

while the formal notice by Libbey and Ford of retirement from the transaction was given on December 11, 1919, the Thatcher Company became the owner of this stock at a date earlier than this. Prior to that date Baldwin and the Thatcher Company must have known that Libbey was out of the transaction. The certificates of stock acquired on August 28, 1919, were held by the Guaranty Trust Company as security for the notes of Baldwin, Libbey, and Ford, yet prior to the date of the notices from Libbey and Ford, and seven months before Thatcher Company paid Libbey for his stock, the certificates held by the Guaranty Trust Company were sent to Elmira, N. Y., the home office of the Thatcher Company, and certificates in lieu thereof were issued December 5–8, 1919, to officers and employees of the Thatcher Company. No certificates were issued to Libbey and Ford. The Thatcher Company assumed directly, on June 7, 1920, the ownership of the stock of all four companies when it took over by bill of sale and assignment all assets and properties of all kinds and description of the Sterling Glass Company.

1. THE PURCHASE OF THE STOCK OF THE FOUR COMPANIES WAS NOT A PERSONAL VENTURE OF BALDWIN, LIBBEY, AND FORD

The relations shown above to have existed between the Thatcher Company and these companies convince that the Thatcher Company was from the

beginning of this transaction the prime mover in it, and that it was not a personal venture of Baldwin, Libbey, and Ford. If it was a personal venture of these men, how is the expenditure of $250,000 of the Thatcher Company's money for stock in the Sterling Company, which money was never returned to the Thatcher Company save as it became the owner of the property of the four companies, to be explained? Surely not by saying that Baldwin, as president of the Thatcher Company, was using his position to finance his own private venture with money of the Thatcher Company. No one would accuse Baldwin of this.

If this was Baldwin's private venture, why do we find the Thatcher Company guaranteeing payment to Axton of $100,000 for the options on the stock of the four companies and his services rendered in connection with the purchase of the stocks?

Were the advances of money by the Thatcher Company to the Travis and Woodbury companies made as a part of Baldwin's venture, or were they made because of the fact that Thatcher Company was, through the ownership of one-half the stock of the Sterling Company, vitally interested in these two companies? So, too, with respect to the payment of $75,000 by the Essex Company to the Thatcher Company, which an employee of the latter testified "became a part of the Thatcher funds" (R. 162), and which does not appear to have been treated as a loan.

If this was a personal venture of these three men, why did the covenant of the Hamilton Company not to engage in the milk-bottle business run in favor of the Thatcher Company instead of Baldwin or some one of the three individuals whose venture it is said to have been?

If this was a personal venture, why did the Sterling Company assume all of the liabilities of Ford, Libbey, and Baldwin in the last clause of the preamble of the contract of August 28, 1919?

Of course, it is somewhat difficult in view of Baldwin's position in the Thatcher Company to tell when he is acting for himself and when as president of the Thatcher Company. Baldwin owned more than 50% of the common stock of the Thatcher Company and a large block of the preferred stock, which had equal voting privileges with the common stock. While, therefore, Baldwin did not own 50% of the entire voting stock, he was the largest individual stockholder and had been its president for years and was very influential in its management and affairs. But the facts here recited disclose that he must have been from the first acting on behalf of the Thatcher Company in this transaction and continued so to act until that Company owned not only the stock but the properties of the three corporations.

Libbey and Ford did not purchase any of these stocks. What these two men and Baldwin did was to lend their credit to the Sterling Company and

to assist that company, half of whose stock was owned by the Thatcher Company, to purchase the stock of these four companies. The money borrowed on their notes was credited to the Sterling Company's account, and the stock when purchased was deposited as collateral for the notes. Thus, simultaneously with the making of the notes and the loan by Guaranty Trust Company of the proceeds to the Sterling Company, the makers were relieved of all liability thereon, except to the extent that the stocks purchased and deposited as collateral were not worth the amount of the loan. Thus, Baldwin, who was president of the Thatcher Company, loaned his name to the venture on behalf of that company; and Libbey, who was greatly interested in the venture if the Hartford-Fairmont patents could be obtained, also assisted in financing a part of the deal as a result of which his own part of the scheme might be furthered. Baldwin accurately described what was done when he said in his annual report to the stockholders of the Thatcher Company:

> We were assisted in obtaining the same (money) by E. D. Libbey, president of the Owens Bottle Co., and Mr. William Ford, a large stockholder in the Owens Company. (R. 43.)

The money with which payment for the stocks was made was none the less the money of the Sterling Company, although Baldwin's, Libbey's, and Ford's names may have been used to borrow it.

When Libbey and Ford withdrew from the transaction, Baldwin did, under the terms of the contract of August 28, 1919, become liable to them on the notes of himself, Libbey, and Ford to the extent that the stocks deposited as collateral would not satisfy the notes, but this assumption of liability did not take with it the ownership of the stocks nor release Libbey and Ford from liability to the Guaranty Trust Company on the notes. No such provision with respect to Baldwin's rights is found in the contract of August 28th. On the other hand, under that instrument, to which Baldwin was a party, the Sterling Company assumed all liability on the notes, with the right to take up the collateral, Baldwin merely agreeing that if Libbey and Ford withdrew they should have in addition to the Sterling Company's guarantee his own personal liability on the notes.

At page 36 counsel for the Thatcher Company urges that the personal nature of the venture is conclusively demonstrated by the mere statement that three men, only one of whom was interested in the Thatcher Company, would not have made themselves liable on notes of this large amount solely to benefit the corporation. This argument overlooks the fact that Libbey was interested in the Sterling Company and in the whole transaction, since it was purposed at this time to obtain the Hartford-Fairmont patents. The prospect of

combining the ownership in one corporation of the rights of the only two complete patented machines for bottle making was so attractive that undoubtedly Libbey was quite willing to lend his name to the Sterling Company to carry out the scheme. In this connection it must be remembered that inasmuch as these companies combined had the exclusive right to use these patents to make milk bottles, it was highly desirable if the patents were to be purchased to secure also these outstanding licenses, which, in effect, constituted the perpetual exclusive right to use these patents in making milk bottles.

Of course, the Thatcher Company did not pay twice for the four companies. It paid $1 to the Sterling Company on June 7, 1920, for all property and assets of every kind and description of that company, including its rights under the contract of August 28, 1919. This nominal consideration only was paid for the reasons, first, that the Thatcher Company owned at the time 100% of the stock of the Sterling Company, which owned the stocks of the four companies; and, second, because in consideration of the assumption by the Thatcher Company of the obligation to pay the remainder of the purchase price of the stocks represented by the notes, no additional consideration should have been paid. While it thus acquired the stocks of the four companies they were still hypothecated to secure the purchase price, and in order to secure the stocks free of obligation it was necessary for

the Thatcher Company to pay the notes. This was done with part of the proceeds of the sale of bonds secured by mortgage on the properties of the Thatcher Company and of the three companies, which was delivered simultaneously with the payment of the notes and the taking up of the collateral. The record shows that the Thatcher Company paid to each of the four companies the nominal consideration of $1 for its properties and assets of all kinds, so that the Thatcher Company did not pay anything for these properties. It had previously acquired all of the stock of the companies by the bill of sale and assignment from the Sterling Company. It did, in effect, pay for the stocks of the four companies when it took over, on June 7, 1920, the liabilities of the Sterling Company under the contract of August 28, 1919, and later under this contract paid the notes and took up the collateral. Its payment, therefore, on July 3, 1920 (R. 143), was not for the properties of the four companies but for the remainder of the purchase price of the stocks which had been purchased on August 28, 1919, by the Sterling Company, whose rights and liabilities had been taken over by the Thatcher Company.

2. BY THE CONTRACT OF AUGUST 28, 1919, THATCHER COMPANY HAD UNCONDITIONAL RIGHT TO PAY THE NOTES AND TAKE UP THE STOCK

The contract of August 28, 1919, under which the Sterling Company assumed all liability on the notes of Baldwin, Libbey, and Ford, and which provided that upon the payment of these notes by the Sterling Company the collateral should become the property of the company, did not, as urged by counsel for petitioner, provide alternative propositions under one of which the Sterling Company assumed the liability and could take up the collateral upon payment of the notes; and under the other of which Baldwin was to assume this liability, with the right to take up the notes and have the collateral. Under the terms of this contract the Sterling Company unconditionally assumed the liability on the notes, with the right to pay them and take up the collateral. Both its liabilities and its rights are unqualified under the terms of the contract. Paragraph Three of the contract does not provide an alternative proposition by which Baldwin is to pay the notes and take up collateral, but merely provides that in the event Libbey withdraws from the transaction he shall have the security of Baldwin's promise to assume the liability on the notes in addition to the security of this assumption in the first paragraph of the contract by the Sterling Company. It will be noticed also that Paragraph Four of the contract

provides that upon the payment of the moneys by Baldwin, specified in Paragraph Three, Libbey and Ford release to Baldwin, *not* any interest in the stocks deposited as collateral for the notes, but all interest in the stock of the *Sterling* Company.

It is respectfully submitted, therefore, that both of the conclusions by counsel for the petitioner as stated on p. 29 of his brief are unsound and not supported by the evidence.

II

The acquisition of the stock by Sterling Company had the same legal effect as though the Thatcher Company had directly acquired them

The Act provides that it shall be unlawful for a corporation to acquire, *directly or indirectly*, the stock of one or more corporations where the effect may be to substantially lessen competition between them, or any of the, etc.

The Thatcher Company appears to have thought that it could organize a corporation whose stock it would own and have that corporation purchase the stock of the four competing companies and escape the provisions of the statute. This, it is submitted, it could not do. When the Thatcher Company owned 50% of the stock of the Sterling Company, which latter company had purchased the entire stock of the four competing companies, it was in exactly the same position it would have have been had it purchased directly 50% of the stock of the four companies. When the Thatcher Company

became the owner also of Libbey's stock in the Sterling Company, although Libbey's stock may not have been transferred of record to the Thatcher Company, the Sterling Glass Company became nothing but the Thatcher Company acting under another name. The Thatcher Company can not escape the Clayton Act because of the corporate entity of the Sterling Glass Company.

The Court held on this point that the Thatcher Company could not by the interposition of the Sterling Company bar the operation of the statute. It said:

> The interposition of the Sterling Company, created by the respondent to spend its money in the purchase, was not the act of a legal entity which can blind the court to the real transaction or bar the operation of the statute. "Courts of equity will look behind a corporate fiction, and if it clearly appears that one corporation is merely a creature of another, the latter holding all the stock of the former, thereby controlling it as effectively as it does itself, it will be treated as the practical owner of the corporation, when necessary for the purpose of doing justice." *United States* v. *United Shoe Machinery Company*, 234 Fed. 127; 258 U. S. 451; *Brown* v. *Pennsylvania Railroad Company*, 235 Fed. 669; 250 Fed. 513. "If any general rule can be laid down in the present state of authority it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the con-

> trary appears: but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons." *United States* v. *Milwaukee Refrigerator Transit Company,* 142 Fed. 247. (R. 330.)

Two other decisions under the Clayton Act bear upon this point. In *United States* v. *New England Fish Exchange et al.,* 258 Fed. 732, the Court (Bingham, Circuit Judge) held that where the Bay State Fishing Company of Maine organized corporations under the laws of Maine to which was transferred the existing business of the old corporations organized under the laws of Massachusetts, and the stock of the new corporations was transferred to the Bay State Fishing Company of Maine, the transaction was as much a violation of the Clayton Act as though the stock of the Massachusetts corporations had been taken over directly.

So, also, in *Aluminum Company* v. *Federal Trade Commission,* 284 Fed. 401, the Circuit Court of Appeals for the 3rd Circuit held that the Aluminum Company violated Section 7 of the Clayton Act, where it organized a new corporation, two-thirds of whose stock it purchased, the new corporation taking over the assets and business as a going concern of the only important competing mill rolling aluminum sheets of certain widths.

By creating a new corporation to purchase the stock of the four competing corporations, the

Thatcher Company did not put itself in any better position under the law than if it had acquired the stock of the four corporations directly.

III

Thatcher Company directly acquired the stock of the four companies not later than June 4, 1920

Ultimately, as we have shown (supra, p. 15), the Thatcher Company actually acquired directly the stocks of the four companies. This took place on June 7, 1920. The Thatcher Company can not escape the prohibitions of the Act by claiming that there was at this time no competition between the corporations, where, as shown, that competition was eliminated by the Thatcher Company itself through its original ownership of 50%, and ultimately 100%, of the stock of the Sterling Company and its immediate control and direction of the affairs of the four corporations through this ownership.

IV

The acquisition by the Thatcher Company of the stock of the four corporations eliminated competition between those companies and between the Thatcher Company and those companies, restrained trade, and tended to create a monopoly

The Commission found and the Court below sustained the finding (R. 331) that the effect of the acquisition by the Thatcher Company of the stock of the Essex, Travis, Lockport, and Woodbury companies was to eliminate all competition between those companies and between them and the

Thatcher Company, to restrain trade in the milk-bottle business in the sections and communities of the United States in which the four companies were engaged in commerce, and tended to create a monopoly in interstate commerce in the milk-bottle business.

The evidence clearly establishes that all competition between the four companies named ceased immediately upon the acquisition by the Sterling Company of the stock of the four companies. The competition among these companies and between these companies and the Thatcher Company was more than "substantial." The business of these five companies and that of J. T. & A. Hamilton Company, which the Thatcher Company also acquired, amounted to at least 70% of the milk-bottle business. These companies controlled among them the exclusive right to use the only efficient machinery for manufacturing glass milk bottles by mechanical processes. They were, therefore, in position to offer the most effective competition to each other and to others engaged in the business. The combination of these companies eliminated the principal and most effective competition in interstate commerce in the milk-bottle business.

The effect of the acquisition by the Thatcher Company of the stock of these four companies was not only to tend to create a monopoly, but it, in fact, created a monopolistic unit in the milk-bottle busi-

ness. The amount of the business controlled by them, together with the tremendous advantage which the control of the most efficient mechanical means of manufacture gave to the corporation, made the Thatcher Company a virtual monopoly. This degree of the control of an industry is held by practically all of the authorities to constitute a monopoly within the meaning of the Sherman Law. (*Swift & Co.* v. *U. S.*, 196 U. S. 375, 394; *U. S.* v. *Reading Co.*, 226 Fed. 229; *U. S.* v. *Patterson*, 222 Fed. 599, 625; *U. S.* v. *Dupont Powder Co.*, 188 Fed. 127, 145.)

V

The statute authorizes the commission to require the divestiture not only of the certificates of stock but of the rights of which those certificates were evidence

We have established, we believe, that the Thatcher Company acquired the share capital of the Essex, Travis, Lockport, and Woodbury companies, and, at least in the case of the three companies first named, in violation of the statute. We are concerned here only with the question of the remedy provided by the statute. Section 11 of the Act directs the Commission to enter an order requiring the corporation to "cease and desist from such violations of law and divest itself of the stock held," etc. As previously pointed out, the "violation of law" consists in (a) the acquisition of stock or share capital, and (b) the substantial lessening, or threatened substantial lessening, of competition between the

corporations, restraint of trade in any section or community, or tendency to create monopoly. The lessening of competition is in its nature a continuing thing, just as the corporate combination in the Standard Oil case was held to be a continuing threat to monopolize and a monopolization. To cease and desist from the violation of law is to cease and desist from holding the stock and from lessening competition or from restraining trade. To this end the statute provides that the Commission shall issue an order directing the corporation to divest itself of the stock held in the manner prescribed by the Commission. This divestiture can result in a removal of the restraint upon competition or upon trade only if the assets and properties, the rights in which were acquired by the Thatcher Company, are sold by that company in obedience to the statute.

1. THE STATUTE EXPRESSLY CONFERS AUTHORITY UPON THE COMMISSION TO REQUIRE THE DIVESTITURE OF THE RIGHTS WHICH THE CERTIFICATES OF STOCK REPRESENTED WHEN PURCHASED

The share capital of a corporation is "a right which its owner has in the management, profits, and ultimate assets of the corporation." (Clark on Corporations, 7th Ed., Vol. I, p. 55.) For a corporation to acquire the share capital of another within the meaning of a statute is to acquire these rights. This, then, is what the corporation must divest itself of under the mandate of the Commis-

sion. The certificates of stock are merely the evidence of these rights. This Court will not assume that Congress did a vain or useless thing. For Congress to have directed the divestiture of pieces of paper with no value behind them would have been useless. The statute should have a reasonable construction. Such a construction requires that it should be held as directing the divestiture of the share capital acquired under such conditions that it shall represent, so far as any voluntary act of the acquiring corporation is concerned, at least the same rights and values which it represented when it was purchased. For this is what was purchased—not mere scraps of paper. If this be the correct interpretation of the statute, then no doctrine of implied powers need be invoked to justify the Commission's order. The provision with respect to physical properties and assets is mere specification of that of which the certificates of stock are evidence and is clearly warranted by the express language of the statute.

2. THE POWER TO MAKE EFFECTIVE THE DIVESTITURE OF SHARE CAPITAL BY PROVIDING THAT THE PROPERTIES AND OTHER ASSETS SHALL BE INCLUDED THEREWITH IS NECESSARY AND IS BY FAIR IMPLICATION CONFERRED

If the nature of the authority which the Thatcher Company claims the Commission has assumed without warrant of the statute be analyzed, it will be seen that the Commission did not by requiring the divestiture of properties and assets assume any

substantive or regulatory power nor any jurisdiction of a subject matter not expressly committed to it by the Act. That part of the statute which authorizes the Commission to require divestiture of stock is concerned only with the remedy for the wrong which the substantive law of the Section denounces.

To carry out the purpose of the statute to restore competition as contemplated by the remedy prescribed by the Act, it is absolutely necessary that the Commission require the Thatcher Company to divest itself of the share capital of the Essex, Travis, and Lockport companies in such manner that such stock shall carry with it that which it represented when acquired.

In this connection the Court below said:

> To carry out the *purpose* of the statute the Commission therefore made an order commanding the respondent to cease and desist from the ownership and control of the assets, etc. * * * We hold that the statute is remedial, not punitive. (Western Meat Company v. Federal Trade Commission, 1 Fed., 2nd, 295; Id. 4 Fed., 2nd, 223.) The sole *purpose* of a valid order of the Commission must be to remedy an unlawful situation. In effecting the remedy, however, the Commission must meet the situation as the offending corporation has made it. If it created the situation so as to defeat the statute, the offending party can not be heard to say that thereby the Commission

> is helpless and the law unenforcible. (R. 332.)

The power specifically to require the divestiture of the properties being absolutely necessary to effectuate the divestiture, the Commission will be held to have such power even if not conferred in express terms.

> When a statute gives a right or imposes a duty, it also confers by implication the power necessary to make the right available or to discharge the duty; * * *.
>
> When the legislature gives power to a public body to do anything of a public character, the legislature means also to give to such body all rights without which the power would become wholly unavailable, although such meaning can not be implied in relation to circumstances arising accidentally only. (Lewis' Sutherland on Statutory Construction, 2nd Ed., Vol II, pp. 947–948.)

So when Section 11 of the Clayton Act provides that the Commission shall require a corporation to divest itself of stock or share capital acquired in violation of the Act "in the manner prescribed by the Commission," it carries with it the authority to require the divestiture to be made in such form and in such manner as to be effective.

Statutes conferring special jurisdiction upon the Federal Courts are to be strictly construed, and, yet, where authority is conferred to remedy specified illegal conditions, it is held to carry with it all

that is necessary to make the remedy effective. The Sherman Law confers upon the Federal Courts the power to "prevent and restrain violations of this Act." It has been contended that this language authorizes only the restraining in the future of the doing of acts which have been proven to be in violation of the law. But this Court held in the Standard Oil and Tobacco cases (221 U. S. 1, 77, 78; 221 U. S. 106, 184) that where a condition had been brought about which constituted a continuing attempt to monopolize and a continuing monopolization contrary to the statute, the Act authorizes the application of such remedies as will correct the unlawful condition.

So here the nature of the remedy provided manifests unmistakably the object of Congress, namely, to restore the competition in interstate commerce which the acquisition of the stock eliminated, or threatens to eliminate. To do this the Commission may order divestiture of the stock in the manner prescribed by it. Manifestly this must be held to confer authority to make that divestiture effectual for the purpose of carrying out the intention of Congress—to restore competitive conditions in harmony with the law.

3. CASES CITED BY COUNSEL FOR THATCHER COMPANY DISTINGUISHED

The cases cited by counsel for Thatcher Company are not in point. In each instance they hold that where regulatory power over a subject matter

is not clearly conferred it may not be implied; or where a particular procedure is prescribed, a different procedure may not be followed.

In *I. C. C.* v. *C. N. O. & T. P. R. Y.* (167 U. S. 479) this Court held that power to exercise the legislative function of fixing reasonable rates for all railroads in the United States would not be implied but must be unmistakably granted. Manifestly, a power of such scope must be expressly conferred. It is quite another thing to imply the power to make effective a remedy which is specifically prescribed.

In *United States* v. *P. R. R. Co.*, 242 U. S. 208, the Interstate Commerce Commission sought to establish by the interpretation of general words in the statute authority to require the railroads of the country to furnish tank cars. This Court pointed out that if the interpretation given to the statute by the Commission were correct, the law authorized the Commission affirmatively to require all railroads of the country to furnish special equipment of any and all classes, and held that jurisdiction of such a sweeping character would not be found except in express language; and that what the statute in fact authorized the Commission to do was to regulate practices of the companies which did in fact supply such equipment. The attempt to imply such far-reaching, affirmative, regulatory power is quite different, as already contended, from implying the power to make effective a remedy specifically granted.

The case of *Wilder Manufacturing Co.* v. *Corn Products Co.* (236 U. S. 165) is not in point. There the Court held that the power expressly conferred upon the Attorney General to dissolve a combination as violative of the Antitrust Act was inconsistent with the right of an individual to assert as a defense to a contract on which he was otherwise legally liable, that the other party had no legal existence in contemplation of the statute. An analogous question under Section 7 of the Clayton Act would be whether a private individual who is sued in contract by a corporation which holds the stock of other corporations in violation of Section 7 can set this fact up in defense of the action; or whether a private individual may proceed by injunction to prevent violations of Section 7 where the statute prescribes that such proceedings shall be by the Trade Commission or by the Attorney General suing in the districts courts. Such questions have no relation to whether the authority to compel divestiture of stock carries with it the power to make such divestiture effective.

VI

Section 7 was not intended to prevent only secret acquisitions of stock of competing corporations

Congress did not intend by Section 7 to prevent only secret acquisitions of stock of competing corporations. It is probably true that because acquisitions of stock of competing corporations afforded a very easy means of secretly controlling compe-

tition, Congress saw fit to prohibit the purchase of stock where its effect might be to substantially lessen competition, etc. While this was one of the moving causes, the language of the statute can not be tortured into a prohibition only of secret acquisitions or holdings of stock in competing corporations. If secret ownership of the stock were all that the statute is directed against, the remedy of divestiture would never have been provided. The procedure prescribed for proceedings by the Commission under Section 11 would necessarily result in a full publication of the facts and the ownership of the stock would no longer be secret.

According to the contention of the Thatcher Company, no divestiture of the stock need follow such disclosure since the object of the statute would have been accomplished. The express provision for divestiture after full publicity is given the whole matter through the Commission's hearings is conclusive proof that mere secret holding was not what the statute sought to reach. The suggestion of counsel for the Thatcher Company that if a corporation when proceeded against by the Commission for illegal acquisition of stock in competing corporations would promptly take over the properties and assets of all description, including the good will of the companies, the object of the statute will have been attained, finds no support either on the face of the statute or in its legislative history. The illegality of the acquisition is dependent solely upon its effect to lessen competition between the

companies or to restrain trade in any section or community or to tend to a monopoly and not upon its secret character.

Nor is there foundation, it is submitted, for the conclusion that it was *only* because of the fact that the stock was secretly acquired that the statute was passed. Congress must have recognized that it was far easier to acquire 51% of the stock of a corporation than to acquire the physical properties and assets with the accompanying appraisals of tangible properties, good will, and the like, the necessity for procuring of the consent of stockholders to the sale, etc. Moreover, the power of a given amount of capital to control competition is practically doubled if it may be used to purchase slightly over one-half of the stock of such companies. For these and other reasons, Congress saw fit to abolish this method of controlling competition.

Nor is it sound to urge that merely because a merger of physical properties of several corporations would in a given case be legal under the Sherman Law a purchase by one of them of the share capital of the others, if followed by a merger of the physical properties, ought not to be restrained. The Clayton Act, as this Court has held, established a new and different test of legality than that provided by the Sherman Law and sought to halt restraints of trade in their incipiency. (*United Shoe Machine Company* v. *United States*, 258 U. S. 51; *Standard Fashion Company* v. *Ma-*

grane-Houston Company, 258 U. S. 346.) From the viewpoint of the Clayton Act only if the acquisition by one corporation of the share capital of others would not lessen competition or restrain trade within the meaning of that Act can the merger of the physical properties through purchase of stock be justified.

VII

The Thatcher Company can not take advantage of its own wrong by voting itself, for a nominal consideration, the assets and properties of the corporations whose stock it has illegally acquired

The statute prohibits the purchase of stock under the circumstances and with the effects described. If stock is acquired in violation of the Act, and the remedy is divestiture of the stock, then its continued holding is unlawful. If, while illegally holding stock illegally acquired, the Thatcher Company seeks permanently to secure to itself the fruits of its violation of law by using the stock, by voting or otherwise, to acquire the physical properties, business, and good will of the companies, the entire transaction is unlawful and may be undone. The Thatcher Company can not take advantage of its own wrongful act and its illegal possession of the stock to acquire the physical properties. The maxim that no one may take advantage of his own wrong is one of general jurisprudence applied in various relations. The principle has been well stated by the Supreme Court of North Carolina in

the case of *Little* v. *Fleischman et al.* (98 S. E. 455, 458), as follows:

> That no man should be permitted to take advantage of his own wrong is not only a principle of the common law but a maxim of general jurisprudence which is well recognized and established. It is based on elementary principles and is applied both in courts of law and of equity, the reasonableness and necessity of the rule being manifest. It is of such general application that it admits of illustration from every branch of legal procedure, and is one of the basic principles which govern this case. (Broom Legal Maxims (6 Am. Ed.), p. 212, Star, p. 275, and cases.) It applies even though the actual wrong was unconsciously committed, which we have no doubt was the case here.

This fundamental rule of conduct should be construed with all the more strictness against the party whose claimed right arises out of the violation of the general law enacted to effectuate the public policy of a state or nation. Section 7 of the Clayton Act is a declaration by Congress of public policy. If this Court finds that the acquisition by the Thatcher Company of the stock of the Essex, Travis, and Lockport companies was unlawful, it will not permit it to evade the provisions of the statute by so simple a device as the purchase of physical properties and business through the voting power of the stock held. (*Levy* v. *Kansas City,* 168 Fed. 524, C. C. A., Eighth Circuit, and cases

therein cited.) The Court below followed the opinion of the Supreme Court of North Carolina, supra.

VIII

The Circuit Court of Appeals has jurisdiction to enter a decree affirming the order of the commission requiring the Thatcher Company to divest itself of the share capital, assets, and properties

Section 11 of the Clayton Act provides that upon application of the Commission to the proper circuit court of appeals to enforce its order, and upon filing of the transcript of the proceedings, that court—

> shall have *jurisdiction* of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a *decree* affirming, modifying, or setting aside the order of the Commission or board.

The jurisdiction conferred upon the circuit courts of appeals is original jurisdiction. (*Silver* v. *Federal Trade Commission*, 292 Fed. 752; *Butterick Co.* v. *Federal Trade Commission*, 4 F. 2nd 910.)

The circuit court of appeals in this case had jurisdiction of the proceeding and of the question determined therein. "Jurisdiction is the right to put the wheels of justice in motion, and to proceed to the final determination of a cause upon the pleadings and evidence." (*Venner* v. *Great Northern*

Ry., 209 U. S. 24.) No better definition of jurisdiction can be found than that given by this Court in *Rhode Island* v. *Massachusetts* (12 Peters 657, 718):

> Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them * * * the question is, whether on the case before the Court their action is judicial or extrajudicial, with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the Court has jurisdiction; * * *.

A "decree" is the judgment or sentence of a court of equity. It is the judicial decision of a litigated cause by a court of equity. (I Bouvier, 3d Revision, 802.)

In construing the Clayton Act the legislative intent is to be ascertained from the statute as a whole, and that construction given which makes the whole effective. (*Blair* v. *Chicago*, 201 U. S. 400.) "In this inquiry the intention of the legislature is to be sought for. That, whatever it may be, constitutes the law." (*James* v. *Milwaukee*, 16 Wall. 159.) The Act is a declaration of public policy by the nation. If it may be evaded by the methods disclosed in the record Congress has enacted a vain thing.

The Clayton Act is a remedial statute (*Western Meat Co.* v. *Federal Trade Commission,* I Fed. 2d 295; Id. 4 Fed. 2d 223; Opinion of Court below, R. 332) and should be liberally construed, so that it may be effectual against the evils it was designed to remedy. This principle is as applicable to provisions for remedies as to provisions of substantive law.

That the circuit courts of appeals when sitting as courts of original jurisdiction in these cases have the power contended for by the Commission is borne out by other provisions of the Clayton Act. Section 15 of that Act confers jurisdiction upon the district courts of the United States to prevent and restrain violations of the Act, including, of course, Section 7 thereof. The language of Section 15 is identical with Sections 4 and 5 of the Sherman Anti-Trust Act. The scope and character of the jurisdiction of the Federal Courts under these sections of the Sherman Law has been adverted to (supra, p. 51). The district courts have the identical jurisdiction under the Clayton Act, since it is conferred by the same words. In a case in the District Court, instituted by the Attorney General, it can not be doubted that the Court would have power to enter a decree compelling the divestiture of corporate stocks acquired in violation of Section 7, together with the assets and properties of the corporations. It is not reasonable to contend that Congress intended to clothe the various circuit

courts of appeals, when sitting as courts of original jurisdiction in Trade Commission proceedings under the Clayton Act, with a narrower and more restricted jurisdiction in respect of the efficacy of the remedies which they can afford than is conferred by the same Act upon the district courts under the authority of Section 15.

The judgment of the Court below should be affirmed.

BAYARD T. HAINER,
Chief Counsel, Federal Trade Commission,
ADRIEN F. BUSICK,
Assistant Chief Counsel,
Attorneys for the respondent.

13360—26——5

APPENDIX

[PUBLIC—No. 212—63D CONGRESS]

[H. R. 15657]

AN ACT TO SUPPLEMENT EXISTING LAWS AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES, AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws," as used herein, includes the act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any

insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

* * * * *

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or

any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from

extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

* * * * *

SEC. 11. That authority to enforce compliance with sections two, three, seven, and eight of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations, and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven, and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days

after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to

the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modifi-

cation or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

* * * * *

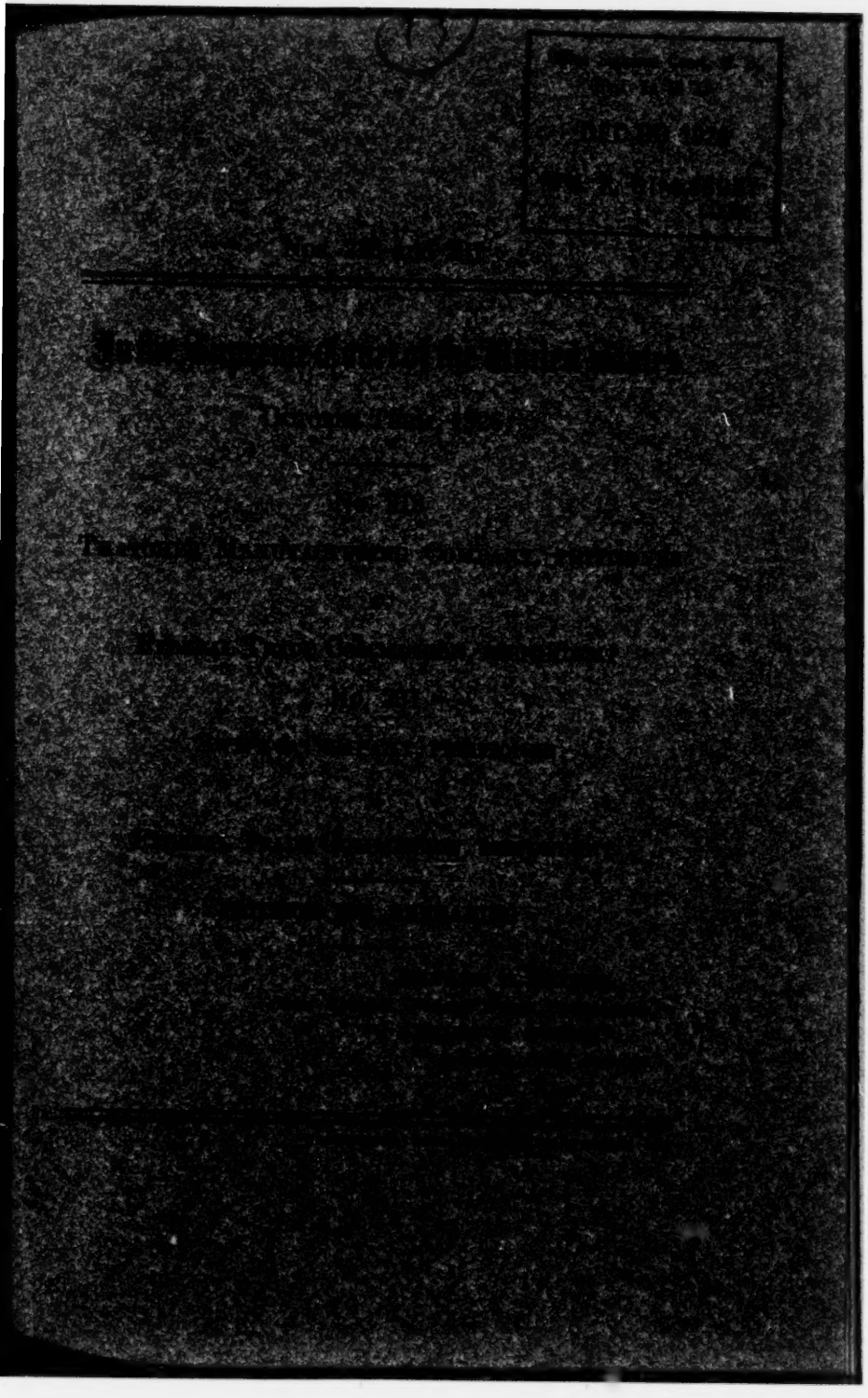
SEC. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may

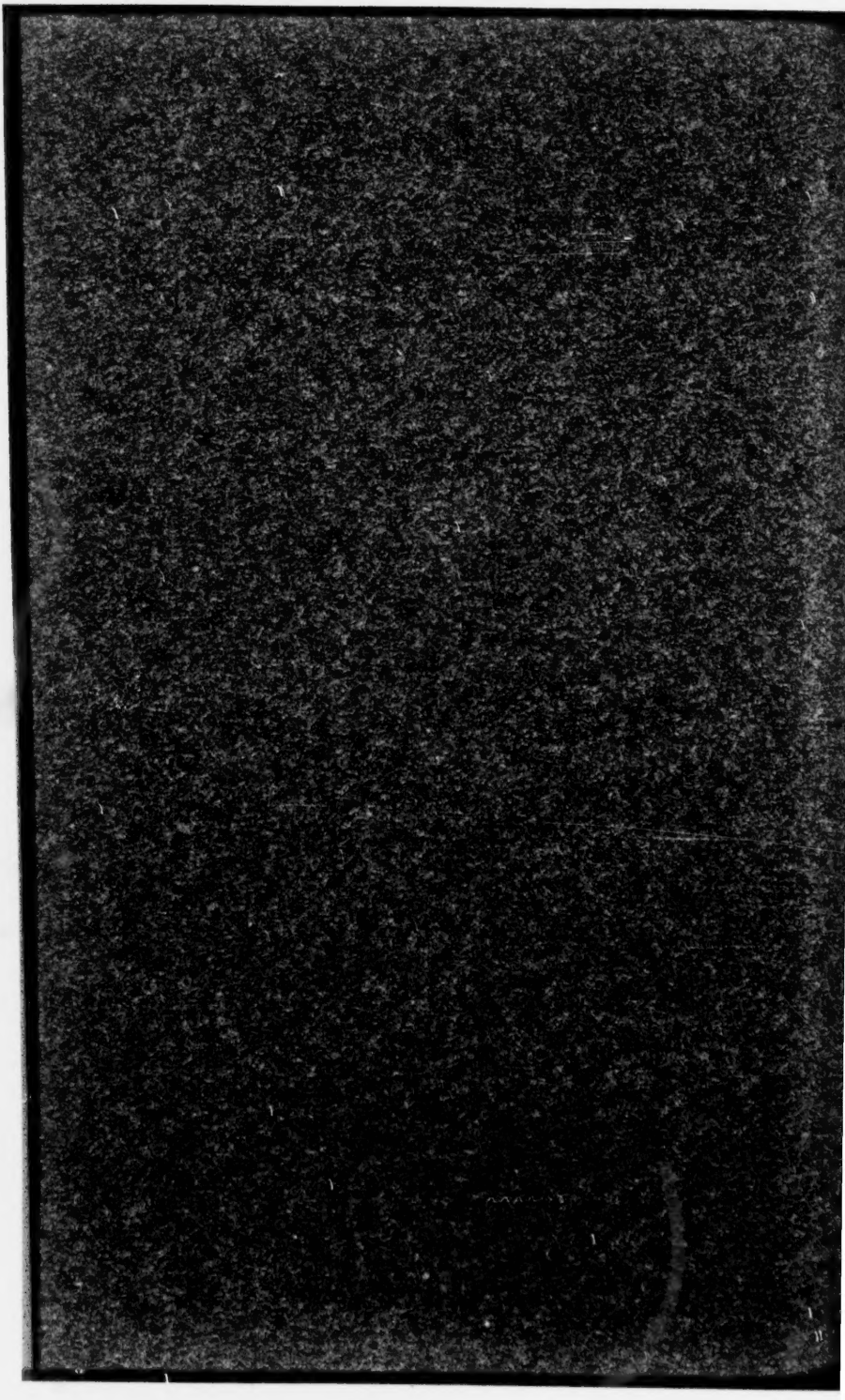
at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpœnas to that end may be served in any district by the marshal thereof.

* * * * *

Approved, October 15, 1914.

○





In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 213

THATCHER MANUFACTURING COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

No. 231

SWIFT & COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION FOR REHEARING

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Federal Trade Commission is constrained to petition this Honorable Court for a rehearing in the above-entitled causes, the decision of the Court having been rendered therein on the 23rd day of November, 1926, on the grounds and for the reasons hereinafter stated.

1. The distinction drawn by the Court between a case where stock is unlawfully acquired and the

assets transferred prior to the issuance of a complaint, and a case where the assets are transferred subsequent to the issuance of a complaint, is unsound because (*a*) the test of the violation of the statute is the unlawful stock acquisition and the law has been violated as much in the one case as in the other, and (*b*) the ownership of the assets is in both cases the "fruits" of the unlawful acquisition, there being no distinction in law unless it is the purpose of the Court to hold that the Commission in the latter case has the equitable power to order a continuance of the *status quo pendente lite*—a power which the courts have held the Commission does not possess. (*National Harness Manufacturers Association* v. *Federal Trade Commission*, 268 Fed. 705, 707; *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission*, 280 Fed. 45, 48; *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307, 312; *Eastman Kodak Company* v. *Federal Trade Commission*, 7 Fed. (2d) 994, 996; *American Tobacco Co.* v. *Federal Trade Commission*, 9 Fed. (2d) 570,586.)

The result of the decision is that a corporation may acquire the stock in competing corporations, use it to restrain competition until its purchase is discovered, and then, if it can record the transfers of the properties before the Commission can file a complaint, defeat any remedy at the hands of the Commission, though the corporation has deliberately profited by its violation of the law. While the disastrous consequences which will follow a

particular construction of a statute will not prevent the adoption of that construction where no other reasonable construction can be made, nevertheless the statement of these consequences may serve to make vivid the points involved, and, where the statute is open to several constructions, that construction will be adopted which furthers the legislative purpose. Certainly it was not the legislative purpose that Section 11 of the Clayton Act should be so construed as to render it possible for corporations to profit by their admitted violations of Section 7.

2. The opinion and judgment of the Court in these cases is contrary to the reasoning of the opinion in No. 96, *Federal Trade Commission* v. *Western Meat Company*, where the Court held that—

> The Commission may not go beyond the words of the statute properly construed, but they must be read in the light of its general purpose and applied with a view to effectuate such purpose. Preservation of established competition was the great end which the legislature sought to secure.
>
> * * * * *
>
> Further violations of the act through continued ownership could be effectively prevented only by requiring the owner wholly to divest itself of the stock and thus render possible once more free play of the competition which had been wrongfully suppressed.

It is respectfully submitted that this reasoning, applied to the Thatcher and Swift cases, requires

an affirmance of the Commission's orders. The "competition which has been wrongfully suppressed" can be again rendered possible only by requiring a divestiture of the stock of the acquired corporations, together with the properties. The offending companies still own the entire properties and the acquired stocks so far as the record discloses, though in the case of the Thatcher Company the corporations have been dissolved.

The entire situation is in their hands to correct—to undo that which they did. The interests of third parties have not intervened so far as these stocks or properties are concerned. The transfers were merely paper transactions with themselves and can be undone at will.

3. The Court failed to consider and to give effect to the provisions of the statute respecting the power of the Circuit Court of Appeals in these cases.

The statute provides that the Circuit Court of Appeals "shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter, upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission."

Assuming for the moment that the words "affirming, modifying, or setting aside the order of the Commission" do not limit the previous words, the language first above-mentioned would appear

broad enough to confer upon the Circuit Court of Appeals the usual powers of a Court of Equity.

The questions of law involved in these cases are presented to the Circuit Court of Appeals for the first time to any court when a petition is made by the Commission to enforce its order, or when the respondent asks for a review of the order of the Commission, and as a consequence the jurisdiction of the Circuit Court of Appeals is no more appellate than is the jurisdiction of the District Courts of the United States to vacate orders of the Interstate Commerce Commission. Hence, it would seem that the decrees in the Circuit Courts of Appeals should be upon the lines adopted by Courts of Equity generally in hearing suits for injunction. (*L. B. Silver Co.* v. *Federal Trade Commission*, 292 Fed. 752, 753; Court of Appeals, 6th Judicial Circuit; *Butterick Company* v. *Federal Trade Commission*, 4 Fed. 2nd 910, 913.)

> The jurisdiction of the court in this proceeding is original rather than appellate, and, since it is the former, we may, in our own decree, protect the rights of the parties and in such form as it would be enforceable by us. * * * The decree should be along the lines adopted by the courts of equity in hearing suits of injunction.

This same question arose in the case of *Northern Securities Co.* v. *United States* (193 U. S. 197).

Mr. Justice Harlan, speaking for the Court on this subject, said (p. 357):

> It is here suggested that the alleged combination had accomplished its object before the commencement of this suit, in that the Securities Company had then organized, and had actually received a majority of the stock of the two constituent companies; *therefore*, it is argued, no effective relief can now be granted to the government. This same view was pressed upon the circuit court, and was rejected. It was completely answered by that court when it said: "Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the Anti-Trust Act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously, the act, when fairly interpreted, will bear no such construction."

With respect to the relief to be granted by the Circuit Court of Appeals in order to enforce the Commission's orders, we think that the views expressed by Mr. Justice Harlan in concluding his opinion in the Northern Securities case are applicable. The Learned Justice said (pp. 360):

> Guided by these long-established rules of construction, it is manifest that if the anti-trust act is held not to embrace a case such as is now before us, the plain intention of the legislative branch of the government will be defeated. If Congress has not, by the words used in the Act, described this and like cases, it would, we apprehend, be impossible to find words that would describe them. This, it must be remembered, is a suit in equity, instituted by authority of Congress "to prevent and restrain violations of the act," § 4; and the Court, in virtue of a well-settled rule governing proceedings in equity, *may mould its decree so as to accomplish practical results—such results as law and justice demand.* (Italics ours.)

In *Camp* v. *Boyd* (229 U. S. 530) this Court held that a court of equity ought to do justice completely and not by halves. Mr. Justice Pitney, speaking for the Court in this case (p. 552) said:

> One of the duties of such a court is to prevent a multiplicity of suits, and to this end a court of equity, if obliged to take cognizance of a cause for any purpose, will ordinarily retain it for all purposes, even though this requires it to determine purely legal rights that otherwise would not be within the range of its authority.

To the same effect see *Shaffer* v. *Carter* (252 U. S. 37) and *McGowan* v. *Parish* (237 U. S. 285).

Unless, therefore, the words "affirm, modify, or set aside" limit and confine the powers conferred

upon the Court, it would have had under general equity powers jurisdiction to enter any decree necessary to enforce the statute.

The words, when applied to a reviewing court, confer authority to enter any decree which the record before the court warrants and the law justifies.

> The power to modify is generally, by virtue of statutory authority or requirement, the power to render such judgment as the lower court should have rendered, where the appellate court is in possession of all the facts and evidence or otherwise occupies the same position as the trial court. * * * On appeals in equity cases, the higher court has somewhat broader powers of review than on appeals in actions at law tried before a jury, and further it generally has the benefit of findings of fact made by the trial court. Accordingly, on such an appeal, where the court can see from the record what the rights of the parties are, it not only has power to render such a decree as ought to have been rendered below, without remanding the case, but it is also held to be its duty to do so; and in some jurisdictions it is the invariable practice to render final judgment, and not remand the case for further proceedings, but in other jurisdictions such practice apparently does not obtain. Likewise, on appeals from probate courts, the appellate court may render such order or decree as the probate court might and should have done; and in a case tried by the court alone, without a jury, the appellate court may render such judg-

> ment as the lower court should have entered, where the record is sufficient for that purpose, as where there is an agreed statement of facts, where the facts are not disputed, or where the facts have been fully and sufficiently found by the trial court. (4 Corpus Juris, 1150–1151.)

Where the alternative power is conferred upon an appellate court to modify or remand to the court below for modification in accordance with the opinion of the superior court, the latter may pursue either course. If the court remands with instructions to modify in accordance with its opinion, the decree would continue to be that of the court below. (*Silver* v. *Federal Trade Commission*, 292 Fed. 752.)

But where, as under the Trade Commission Act, the jurisdiction of the court is original (*Silver* v. *Federal Trade Commission*, 292 Fed. 752; *Butterick* v. *Federal Trade Commission*, 4 F. 2nd, 910), the court must enter its own decree fixing the rights of the parties and in such form that it will be enforceable by it. (*Silver* v. *Federal Trade Commission*, 292 Fed. 752.)

That the powers of the Circuit Courts of Appeals in these cases are not confined to a reframing of the order is shown by the decision of this Court, holding that although the statute provides that the Commission's findings of fact shall be conclusive, the Circuit Courts of Appeals may nevertheless make findings of fact in addition to those made by

the Commission and need not remand the case to the Commission to make such additional findings. The Court said:

> Manifestly, the court must inquire whether the Commission's findings of fact are supported by evidence. If so supported, they are conclusive. But as the statute grants jurisdiction to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside an order, the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission. If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the Commission—the primary fact-finding body—with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the court has full power under the statute so to do. The language of the statute is broad and confers power of review not found in the Interstate Commerce Act. (*Federal Trade Commission* v. *Curtis Publishing Company*, 260 U. S. 568, 580.)

In the Northern Securities case, as well as in the Standard Oil and Tobacco cases, this Court, in construing Section 4 of the Sherman Act, held that where a situation arose which constituted a viola-

tion of the statute "and power was conferred to prevent and restrain violations of the Act," the Court had full power and jurisdiction to apply such remedies and grant such relief as would correct and prevent the unlawful situation. We think this principle should be applied to these cases.

It will be observed that Section 11 of the Clayton Act clearly specifies when the jurisdiction of the Circuit Court of Appeals attaches and to what extent that jurisdiction may be exercised, and that the judgment and decree of the Court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in Section 240 of the Judicial Code, and that the Court shall have power to make and enter upon the pleadings, testimony, and proceedings a decree affirming, modifying, or setting aside the order of the Commission. It is difficult to see how broader powers could be conferred upon the Court than is given in this Act to meet the situation in the Swift and Thatcher cases.

We think that the foregoing authorities are decisive of the question involved herein.

Wherefore the Federal Trade Commission respectfully prays that a rehearing be granted in these cases and for all appropriate relief.

BAYARD T. HAINER,
Chief Counsel, Federal Trade Commission.

ADRIEN F. BUSICK,
Assistant Chief Counsel.

We hereby certify that this petition is made in good faith and not for delay, and in our opinion is well founded.

BAYARD T. HAINER,
Chief Counsel, Federal Trade Commission.
ADRIEN F. BUSICK,
Assistant Chief Counsel.

O

Office Supreme Court, U. S.
FILED
OCT 19 1925
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925.

No. 7[redacted]231

SWIFT & COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT.

For Record see also 546

ALBERT H. and HENRY VEEDER,
JAMES M. SHEEAN,
FRANK L. HORTON,
Counsel for Petitioner.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

PAGE

The Order of Federal Trade Commission..... 1–3

The Facts 3–4

Reasons Relied on for Allowance of the Writ..... 4–5

Supporting Brief 6–14

- Sections 7 and 11 of Clayton Act..... 6–7
- The order unauthorized by Statute..... 8
- Clayton Act deals with trade practices—not ownership of physical properties..... 9
- Previous construction of Act by the Commission, its members and its Counsel.....9–11
- Legality of ownership of physical property a justiciable question to be adjudicated only by Courts—not administrative Commissions...11–12
- Grave constitutional questions arise under Commission's interpretation that Section 11 confers on the Commission power co-equal with power of Courts of Chancery under Section 4 of Sherman Act.....13–14

TABLE OF CASES AND STATUTES CITED.

Clayton Act (38 Stat. 731, 734, Comp. Stat. Secs. 8835g, 8835j) 6-7

Federal Trade Commission v. Western Meat Co., 4 F. (2d) 223 ..... 4, 5

Kentucky Co. v. Paramount Exchange, 262 U. S. 544 (551) 12

Senate Report 698, 63rd Congress, Second Session, 13 9

Sherman Act (26 Stat. 209, 210) 11, 12, 13

Standard Oil Co. v. United States, 221 U. S. 1 (41-43) 8, 12

Swift & Co. v. Federal Trade Commission, Record pages 1603-1611

United States v. Delaware & Hudson Co., 213 U. S. 366 (408) 13

Wilder Mfg. Co. v. Corn Products Refining Co., 236 U. S. 165 (174) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

SWIFT & COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT.

Swift & Company respectfully prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, which judgment denied (Rec., 1603, 1611, 1613) the petition of Swift & Company, that said Circuit Court of Appeals set aside an order of the Federal Trade Commission entered on August 3, 1922, whereby Swift & Company was ordered to:

> "(1) Cease and desist from further violating Section 7 of the Clayton Act by continuing to own or hold, either directly or indirectly, by itself or by any one for its use and benefit, any of the capital stock of the Moultrie Packing Company and of the Andalusia Packing Company, or either of them, and Cease and Desist from holding, controlling and/or operating, or causing to be held, controlled and/or operated by others for its use and benefit, the former property and business either of the said Moultrie

Packing Company or of the said Andalusia Packing Company, which have been held, controlled and operated by respondent and its employees and agents, following and as a result of respondent's unlawful acquisition of the capital stocks of said named corporations; and to that end, respondent shall

(2) So divest itself of all the capital stocks heretofore acquired by respondent, including all the fruits of such acquisitions, in whatever form they now are, whether held by respondent or by anyone for its use and benefit, of the Moultrie Packing Company, a corporation, and of the Andalusia Packing Company, a corporation, or either of them, in such manner that there shall not remain to respondent, either directly or indirectly, any of the fruits of said acquisitions, including the control and/or operations of said corporations, or either of them, resulting from such acquisitions and/or holdings of such capital stocks.

(3) In so divesting itself of such capital stocks respondent shall not sell or transfer, either directly or indirectly, any of such capital stocks to any officer, director, stockholder, employee or agent of respondent, or to any person under the control of respondent, or to any partnership or corporation either directly or indirectly owned or controlled by respondent.

(4) Cease and Desist from further engagements in unfair methods of competition in violation of an Act of Congress approved September 26, 1914, entitled, 'An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and in so ceasing and desisting, shall Cease and Desist from further suppressing the competition in trade heretofore existing between the Moultrie Packing Company and the Andalusia Packing Company, and between each of said corporations and the respondent, and also Cease and Desist from further holding, owning, controlling and/or operating, directly or indirectly, the plants and businesses of the said Moultrie Packing Company and the Andalusia Packing Company, or either of them, either through direct or indirect ownership and/or control of the capital stock of either said Moultrie Packing

Company or said Andalusia Packing Company and/or through the control and/or ownership of the properties, physical assets and businesses of either of said named corporations.

It is Further Ordered, that the said respondent, Swift & Company, shall within ninety (90) days from the date of service of this order, file with the Commission a report setting forth in detail the manner and form in which it has complied with the order of the Commission herein set forth." (Rec., 90, 91.)

The complaint of the Federal Trade Commission was issued on November 24, 1919 (Rec., 13), long prior to which date (Rec., 8, 10, 51, 108, 1283, 1286, 1303) there had been conveyance, by deed and bill of sale to Swift & Company, of all the physical assets of both the Moultrie and Andalusia Packing Companies. The Commission specifically found that from November 3, 1918, as to the Moultrie Company and from March 30, 1918, as to the Andalusia Company "respondent has operated said plant and business as the plant and business of Swift & Company and does now so operate the same." (Rec., 51.)

The Facts.

The Moultrie plant was built at Moultrie, Georgia, in 1914, and the Andalusia plant at Andalusia, Alabama, in 1916. (Rec., 252, 263.) During the summer of 1917 negotiations between representatives of Swift & Company and stockholders of these two companies resulted in agreement as to price for the entire capital stock of both the Moultrie and Andalusia companies, this method being adopted so that there might be the assurance to the parties who were negotiating the transactions that there would not be a single dissatisfied or disgruntled stockholder. (Rec., 256.) As above stated, deeds and bills of sale from these two companies conveyed to Swift & Company, more than a year before the filing of the com-

plaint, the respective physical assets of these two companies; and upon the Moultrie plant (valued at about $150,000 just prior to the acquisition) Swift & Company made expenditures for enlargements and betterments of about $964,000 between the date of acquisition and October 30, 1920 (Commissioner's Ex. 57, Rec., 1324, and Respondent's Ex. 13, Rec., 1557-8), while upon the Andalusia plant (valued at about $143,000 just prior to the acquisition) Swift & Company made expenditures for enlargements and betterments of about $280,000 between the time of acquisition and July 2, 1921. (Respondent's Ex. 27, Rec., 1571.)

Questions presented and reasons relied on for allowance of the writ.

1. Construction of Sections 7 and 11 of the Clayton Act is presented for the first time for determination by this court in the case of *Federal Trade Commission* v. *Western Meat Company*, wherein writ of certiorari to review decision of the United States Circuit Court of Appeals for the Ninth Circuit (4 F. (2d) 223) was granted on June 1, 1925. This case appears on the docket of this court as No. 410 for the October Term, 1925; and among the reasons set forth in the petition for certiorari in said *Western Meat Company* case (decided on rehearing February 17, 1925) is that an "exigency arises from an irreconcilable conflict between the judgment of the court below and that of the United States Circuit Court of Appeals for the Seventh Circuit in *Swift & Company* v. *Federal Trade Commission*, decided February 16, 1925."

2. The decision, announced February 17, 1925, on rehearing in the *Western Meat Company* case (4 F (2d) 223), while in irreconcilable conflict with the reasoning

and conclusion announced in the opinion filed herein on February 16, 1925 (Rec., 1603-1611; Rehearing denied October 13, 1925, Rec., 1613) presents the question of the power of the Federal Trade Commission to enjoin *future* acquisition of physical assets by a stockholding corporation, while the record herein presents the question of the power of said Commission to deal with and to set aside *past* conveyances of physical assets.

3. The definition of the power and authority (statutory and constitutional) of the Federal Trade Commission under Sections 7 and 11 of the Clayton Act is an important question of federal law which has not been, but should be, settled by this court; and the authoritative construction by this court of said Sections 7 and 11 should comprehensively include the related but nonidentical questions presented by the record in the *Western Meat Company* case (Docket No. 410 in this court) and by the record herein.

Wherefore, it is respectfully submitted that the writ of certiorari should issue as prayed.

SWIFT & COMPANY, *Petitioner,*

By ALBERT H. and HENRY VEEDER,
JAMES M. SHEEAN,
FRANK L. HORTON,
Counsel for Swift & Company.

BRIEF.

The portion of Section 7 of the Clayton Act (38 Stat., 731; Comp. Stat., Sec. 8835g) alleged to be violated is as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
>
> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

Section 11 of said act (38 Stat. 734; Comp. Stat. Sec. 8835j) is as follows:

> "Authority to enforce compliance with sections 2, 3, 7 and 8 of this act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:
>
> Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the

> provisions of Sections 2, 3, 7 and 8 of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. * * * If, upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order."

The Federal Trade Commission interprets said Section 7 as embodying a broad declaration of public policy and said Section 11 as imposing upon the Commission the general power and broad duty of carrying out such declared public policy.

Swift & Company's interpretation of said Section 7 is that instead of being a broad declaration of public policy said Section 7 narrowly and precisely defines a specific obstruction to interstate commerce which the Commission is authorized to remove from the channel of such commerce by a single and exclusive form of remedial order prescribed by Section 11, namely "divestiture of stock held."

It is in obedience to its conception of its duty to prevent evasion of a general public policy on which the Commission predicates its asserted right to order Swift & Company to cease and desist from "*further holding, owning, controlling and/or operating, directly or indirectly, the plants and businesses of the said Moultrie Packing Company and the Andalusia Packing Company, or either of them,* either through direct or indirect ownership

and/or control of the capital stock of either said Moultrie Packing Company, and/or said Andalusia Packing Company, and/or *through the control and/or ownership of the properties, physical assets and business of either of said named corporations.*" (Rec., 91.) (Italics ours.)

Against the construction of said Sections 7 and 11 which is essential to support the order herein, counsel for Swift & Company respectfully submit the following brief outline of their contentions:

1. The language of said sections does not authorize the order herein; and to the offense created by Section 7 and to the remedy prescribed by Section 11 is pertinently applicable the language of Mr. Chief Justice White (limiting remedies under the Sherman Act to those prescribed by that Act) in *Wilder Mfg. Co.* v. *Corn Products Refining Co.* 236 U. S. 165 (174) as follows:

> "Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes."

2. The purpose of the Clayton Act was to arrest, by specific directions to an administrative agency, certain practices theretofore found, in certain circumstances, to have been efficient in obstructing the channel of interstate commerce. Accordingly Congress specified in the Clayton Act most of the practices enumerated by Chief Justice White in the *Standard Oil* case, 221 U. S. 1 (41-43) as means or devices by which the defendant in that case had sought to restrain trade and attain monopoly. In such enumeration the Chief Justice sets forth the holding company (p. 41) and "the operation of bogus independent companies" (p. 43); and our contention is that Section 7 legislated specifically against the "holding company" and the "bogus independent" and Section 11 set up as the single, exclusive writ of execution against this

practice an order that a corporation which restrained interstate commerce through stock ownership "divest itself of the stock held."

3. That it was a definite trade practice, namely "the operation of bogus independent companies" by and through the action taken by "holding companies" in unduly lessening competition and restraining trade which Congress was legislating against in Section 7 of the Clayton Act is shown by reference to page 13 of the report from the Committee on the Judiciary, submitted July 22, 1914 (Senate Report 698, 63rd Congress, Second Session), where this section is discussed under the heading "Holding Companies." In the debates concerning this Section (Congressional Record, August 27, 1914, pp. 14315-6) Senator Cummins said:

> "Wherever the law permits the sale of the business then it ought to be open and public, and a corporation ought not to acquire control of a business simply through the purchase of the stock of a company which continues under its own name, and, so far as the public knows, is independent in its management. That is what I think this section is intended in the main to prevent."

4. The Federal Trade Commission, its members and its counsel heretofore have disclaimed jurisdiction or authority on the part of the Commission to order a respondent to cease and desist from "holding, owning, controlling and/or operating * * * plants and businesses * * * through the control and/or ownership of the properties, physical assets and business." (Rec., 91.)

The Federal Trade Commission, in its conference rulings appearing in its Bulletin No. 1 of January 31, 1916, gives as Conference Ruling No. 8 the following:

> "*The right of one manufacturer engaged in interstate commerce to buy out a competitor, and jurisdiction of the commission in such matters.*—On inquiry as to the right of one manufacturer to buy out a competitor in the same line of business: Held:

> That the only jurisdiction of the commission in respect of such transaction is to enforce the provision of Section 7 of the Clayton Act prohibiting the acquisition by any corporation engaged, in interstate commerce of the capital stock, in whole or in part, of another corporation thus engaged, where the tendency of such acquisition may be to substantially lessen competition between such two corporations, or to restrain interstate commerce or to create a monopoly; and also possibly to enforce section 5 of the Federal Trade Commission Act, if such purchase either of property or of capital stock in connection with other circumstances might constitute an unfair method of competition. *Held, also,* That the mere purchase of the property of such competitor other than capital stock is not prohibited by the Clayton Act or the Federal Trade Commission Act."

In the memorandum of Commissioner Van Fleet of the Federal Trade Commission, issued in connection with the proposed merger of the Midvale Steel & Ordnance Co., the Republic Iron & Steel Co., and the Inland Steel Co., it is stated:

> "So the Clayton Act specifically limits its operation to a case where the combination is effected by the acquisition of shares or share capital, thus under the well-known maxim of statutory construction '*expressio unius,*' etc., excluding its application to any other state of facts. * * *
>
> * * * There was a well-defined purpose in the Clayton Act, namely, to prevent secret combinations by the acquisition of stock, and a reference to the debates over the bill clearly demonstrates this and clearly shows it did not have in mind the prohibition of the merging of competing companies under all circumstances."

Members of the Federal Trade Commission appeared before the Committee on the Judiciary of the House of Representatives (66th Congress) on September 8 and 9, 1919. On page 21 of Serial 5 of the hearings Mr. Victor Murdock, a member of the Federal Trade Commission, testified as follows:

"Now, in section 7, Clayton Act, Mr. Chairman, Congress provided against a corporation's acquisition of stock in competing companies. I think at the time Congress passed that act it was a wise piece of legislation. But section 7 of the Clayton Act certainly needs strengthening now, because section 7 does not include the word 'property'. * * * But the Government cannot win where there is an acquisition of property instead of an acquisition of stock as the law stands to-day."

Support of the view we urge concerning the correlation between Sections 7 and 11 of the Clayton Act is found in the following language taken from page 13 of the brief of James M. Beck, solicitor general; W. H. Fuller, chief counsel, and Edward L. Smith, attorney for Federal Trade Commission, filed in this court, February 19, 1923, in successful resistance of application for certiorari in the case of *Aluminum Company of America* v. *Federal Trade Commission*, 261 U. S. 616:

"There is nothing in the Clayton Act which permits the Commission, when it finds a violation of Section 7 of the Clayton Act, to make any order other than one requiring the corporation which has illegally acquired stock to divest itself of such stock; and it would seem that a Circuit Court of Appeals has no right under the power of modification given to it by the act, to enter any order excepting one which requires a divestiture of the stock illegally acquired."

5. The question of the right "to hold, own, control and/or operate properties, physical assets and businesses"—whether illegally obstructive of the channel of interstate commerce—is a question which Congress has committed exclusively to courts of equity under Section 4 of the Sherman Act (26 Stat. 209), which is applicable alike to corporations and individuals by the specific language of Section 8, which says (26 Stat. 210):

"The word 'person', or 'persons, wherever used in this act, shall be deemed to include corporations

> and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

The question of the legality, under federal law, of ownership (whether corporate or individual) of physical property is to be determined, as we respectfully submit, by "proceedings in equity" to be instituted "under the direction of the Attorney General" and by the entry by a federal court of equity of such "order of prohibition as shall be deemed just in the premises." (See Sec. 4, Sherman Act—26 Stat. 209.)

6. Sections 7 and 11 (although applicable only to corporations) are not arbitrarily and therefore unconstitutionally discriminatory if they be interpreted as dealing *in rem* with the specific evil of *intercorporate stockholding* and as providing the specific remedy of divestiture of stock. This for the reason that "Holding Companies" had been found (*Standard Oil* case, 221 U. S. 1, at pages 41-43) to be one of the means or devices resorted to in efforts to attain monopoly or restrain trade, and it was within the power of Congress to prescribe a form of regulatory order against this *purely intercorporate* practice. However, said sections would be wholly arbitrary and therefore unconstitutional if they be interpreted to mean that the owner of plant A (if such owner be an individual) may buy and operate the physical properties and assets of plant B, but that the owner of the same plant A (if such owner be a corporation) may not buy or operate the identical physical properties and assets of the same plant B. In holding unconstitutional a Wisconsin statute, this court said in 262 U. S. 544 (551):

> "Here the statute authorized the imposition, and there was imposed, on the plaintiff, a highly burdensome requirement because of its corporate origin,—

> a requirement which under the statute could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary."

It is respectfully submitted that the legality of ownership of physical property (in so far as the claimed illegality of ownership is because of Federal anti-trust laws) must be determined under the Sherman Act, which is specifically applicable alike to corporations and individuals, and that such question cannot be adjudicated by the Federal Trade Commission (or in the statutory proceedings for judicial review of orders of such Commission) but can be adjudicated only by "proceedings in equity" instituted by the Attorney General of the United States under Section 4 of the Sherman Act (26 Stat. 209), wherein such Federal court of equity may make such "order or prohibition as shall be deemed just in the premises."

7. In the *Commodities Clause Cases* (213 U. S. 366) one of the rules of statutory construction was stated to be (408) "that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

Congressional authority to enact Sections 7 and 11 is clearly derivable from the commerce clause of the Constitution by interpreting said sections as applying to and covering only situations wherein the facts, judicially determined, show that corporate ownership of stock is so postured as to create a direct and substantial obstruction in the channel of interstate commerce and which obstruction will be removed from such interstate channel by change in the ownership of such stock.

On the other hand construction of said sections essential to support the form of order entered by the Com-

mission herein makes unavoidable the consideration and decision of the grave constitutional question, viz:

> May Congress constitutionally forbid a corporation from openly acquiring and from operating business plants and properties of a corporate competitor under circumstances wherein the transaction would be inoffensive to the law if either seller or buyer, or both, were individuals—the respective positions in the trade, and the instrumentalities used in interstate commerce by the respective corporate and individual vendors and vendees being precisely the same—*i. e.*, does the Commerce Clause confer on Congress the power to forbid to corporations, *merely because they are corporations*, the right to acquire or to operate plants and properties permitted to individuals in identical circumstances?

8. Construction of Section 11 as conferring on the Federal Trade Commission the power of retrospective relief, *i. e.*, the setting aside of deeds and bills of sale, would raise the grave question whether this was not an unconstitutional endowment of an administrative agency of Congress with judicial power.

It is respectfully submitted that the writ should be allowed herein, to the end that in the removal by this Court of the conflict between the decision herein and the decision in the *Western Meat* case, the authoritative construction by this Court of said Sections 7 and 11 be so comprehensive as to make final disposition of all the questions presented by the records in the two cases.

ALBERT H. and HENRY VEEDER,
JAMES M. SHEEAN,
FRANK L. HORTON,
Counsel for Swift & Company.

Office Supreme Court, U. S.
FILED
OCT 2 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926.

No. [redacted] 231

SWIFT & COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF AND ARGUMENT FOR PETITIONER.

ALBERT H. AND HENRY VEEDER,
JAMES M. SHEEAN,
FRANK L. HORTON,
Counsel for Petitioner.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

SUBJECT INDEX.

PAGE

The Grounds of Jurisdiction 1

Statement of the Case 2

The Commission's Order 2-3

The Errors Specified 4-5

1. The Commission is without jurisdiction over "the control and/or ownership of properties, physical assets and businesses."

2. The complaint affirmatively shows lack of jurisdiction of the subject matter as it avers that for about two years prior to the issue of complaint "respondent has operated said plant and business as the plant and business of Swift & Company and does now so operate the same."

3. The strained construction of Sections 7 and 11 sought by the Commission would render said sections unconstitutional.

4. There is no evidence of intercorporate stockholding in such posture or relationship as to confer jurisdiction under Section 7 or to justify order under Section 11.

The Facts 5-19

1. The economic condition which led to the building of the plants 5-8

2. The plants were built in the hope and expectation that when local live stock production had been sufficiently developed the plants would be sold to some one regularly engaged in the packing business 8, 10

3. The negotiations at all times contemplated transfer and conveyance of plants and physical assets to the purchaser..... 11

4. The issue of stock certificates in the names of employees of Swift & Company was merely a convenient expedient to work out the legal details of effectuating the conveyance and transfer which was at all times contemplated by all parties to the negotiations 12-14

5. Such conveyances and the operation of the plants by Swift & Company as owner were known to the Federal Trade Commission and to the Federal Bureau of Animal Industry long prior to the issue of the complaint on which the order is predicated.... 15

6. Meanwhile Swift and Company, as owner of the purchased plants, had expended for enlargements and betterments much more than the original purchase price of such plants 16

7. The communities affected by the order of the Commission protest that there do not exist, presently or potentially, any of the economic evils which furnish the sole justification or excuse for intervention in industry by the Federal Trade Commission 17-19

The Argument Summarized.....22-25

I. Sections 7 and 11 of the Clayton Act do not purport to confer power or jurisdiction upon the Federal Trade Commission over plants, properties or physical assets; and the debates of Congress affirmatively show that Congress

had no intention to confer such power or jurisdiction.

1. The question of the legality of ownership or operation of "plants, properties and physical assets" (in so far as any claimed illegality of ownership or operation is because of Federal Anti-Trust laws) has been committed by Congress to the Courts for determination in "proceedings in equity" instituted by the Attorney General of the United States under Section 4 of the Sherman Act, wherein such Federal Court of Equity may make such "order or prohibition as shall be deemed just in the premises." Congress had no intention to commit to the Federal Trade Commission any jurisdiction or control over "plants, properties and physical assets."

2. The intent of Congress is clearly expressed. Section 7 of the Clayton Act precisely defines certain specific situations arising out of intercorporate stockholding wherein the administrative agency is authorized to issue a single and exclusive form of remedial order which Section 11 defines with like precision, viz., "divestiture of stock held."

3. Even if the language of Sections 7 and 11 were not so clear and unambiguous and even if resort be had to the debates of Congress we find that it was the intention of Congress, through enactment of Sections 7 and 11 of the Clayton Act, to prohibit, under certain conditions, the purchase of

capital stock by "holding companies" whereby there was brought about "the operation of bogus independent companies."

4. Likewise, in case resort be had to the debates of Congress we find that Congress intended to prohibit purchases of capital stock only in the event that interstate commerce would be substantially and injuriously affected by intercorporate stockholding.

II. To construe said Sections 7 and 11 as the Federal Trade Commission has construed them in and by the order under attack would make it necessary to consider grave constitutional questions which do not arise if said Sections are construed to mean precisely and only what they say.

1. The source of congressional authority to enact the Clayton Act is the Commerce Clause of the Constitution (Section 8, Art. I) which gives Congress power "to regulate commerce."

2. Sections 7 and 11 of the Clayton Act are subject to no constitutional infirmity if said sections are interpreted to mean what they clearly say, viz:

> That said sections apply to and cover only situations wherein the facts, judicially ascertained and determined, show that corporate ownership of stock is so postured as to create a direct and substantial obstruction in the current of interstate commerce and which ob-

struction will be removed from such interstate current by change in the ownership of such stock.

3. But to place upon said sections the strained construction necessary to uphold the order of the Commission would at once raise the grave and doubtful constitutional questions:

(a) May Congress forbid a property owner from selling his property and going business to a competitor, merely because the effect of such sale "may be to substantially lessen competition between" the seller and the buyer?

(b) If question (a) should be answered in the affirmative then may Congress forbid a corporation from openly acquiring, through ownership of all the stock of a corporate competitor, the going business of such competitor, under circumstances wherein the transaction would be inoffensive to the law if either seller or buyer, or both, were individuals—the respective positions in the trade, and the instrumentalities used in commerce of the respective corporate and individual vendors and vendees being precisely the same? In other words, may the law forbid to corporations, solely because they are corporations, what it permits to individuals in identical circumstances?

III. The claim by and for the Federal Trade Commission that such Commission has implied judicial power is without foundation.

1. By its order which is attacked herein the Commission has mistakenly assumed that an administrative agency (whose warrant from Congress confers no express authority beyond the entry of an order in certain circumstances that a corporation "divest itself of the stock held") has implied power to function in the orbit of a Court of Chancery, which high Court of Chancery (according to Cowell and Jacobs' Law Dictionary) has "absolute power to moderate the written law, govern its judgment by the law of nature and conscience, and ordering all things *juxta aequum et bonum.*"

2. So long as we keep in mind the fundamentals guaranteed by the Constitution.

(A) That an administrative agency of Congress cannot be given judicial power;

(B) That discriminations between corporations and individuals, in Federal legislation based upon the Commerce Clause, must be founded on some real difference in the manner by which corporations and individuals affect interstate commerce; and

(C) That Federal power to legislate under the Commerce Clause exists only if and when legislation reaches matters, subjects and things which directly—not incidentally and collaterally—affect and thus regulate interstate commerce,

we have no difficulty in so interpreting Sec-

tions 7 and 11 of the Clayton Act as to preserve them from constitutional objection. And these sections can be thus preserved only by rejecting the Commission's conception of its power, as evidenced by the order herein, because such conception is oblivious of constituional guarantees.

The Argument Elaborated.....26-74

I. Sections 7 and 11 of the Clayton Act do not purport to confer power or jurisdiction upon the Federal Trade Commission over plants, properties or physical assets; and the debates of Congress affirmatively show that Congress had no intention to confer such power or jurisdiction 26-43

II. To construe said Sections 7 and 11 as the Federal Trade Commission has construed them in and by the order under attack would make it necessary to consider grave constitutional questions which do not arise if said Sections are construed to mean precisely and only what they say.....44-61

III. The claim by and for the Federal Trade Commission that such Commission has implied judicial power is without foundation..61-74

TABLE OF CASES, TEXTBOOK AND STATUTES CITED.

PAGE

Adair v. U. S. 208 U. S. 161 ..... 49, 66
Addyston Pipe and Steel Co. v. United States, 175 U. S. 211 ..... 40, 62
Aluminum Co. of America v. Federal Trade Commission, 284 Fed. 401 (certiorari denied 261 U. S. 616) 29, 43
American Tobacco Co. v. United States, 221 U. S. 106 ..... 20, 21
A. F. & S. T. Ry. Co. v. Vosburg, 238 U. S. 56 61

Chamber of Commerce v. Federal Trade Commission, 13 F. (2d) 673 55
Child Labor Tax Case, 259 U. S. 20 68
Cincinnati Packet Co. v. Bay, 200 U. S. 179 66
Congressional Record, 63rd Congress 36, 39
Cotting v. Kansas City Stock Yards, 183 U. S. 79 .. 60

Dayton-Goose Creek Ry. Co. v. U. S. 263 U. S. 456 .. 69

Eastman Kodak Co. v. Federal Trade Commission, 7 F. (2d) 994 55

Federal Trade Commission Conference Rulings 42
Federal Trade Commission v. American Tobacco Co. 264 U. S. 298 51
Federal Trade Commission v. Curtis Pub. Co. 260 U. S. 580 74
Federal Trade Commission v. Gratz, 253 U. S. 421 .. 54
First Employers Liability Cases, 207 U. S. 463 51

Greene, in re, 52 Fed. 104 64

Haney, Louis H. "Business Organizations and Combinations" 35
Holden v. Hardy, 169 U. S. 366 52
Hopkins v. United States, 171 U. S. 578 65

Kentucky Co. v. Paramount Exchange, 262 U. S. 544 57

Margolin v. United States, 269 U. S. 93 43

Mennen Co. v. Federal Trade Commission, 288 Fed. 774 (certiorari denied 262 U. S. 759) 74

Moore v. New York Cotton Exchange, 296 Fed. 61; 46 Sup. Ct. Rep. 367 63

National League v. Federal Baseball League, 269 Fed. 681; 259 U. S. 200 68

Northern Securities Co. v. United States, 193 U. S. 197 45, 47

Pipe Line Cases, 234 U. S. 548 63

Rigney v. City of Chicago, 102 Ill. 64 63

Senate Report, 63rd Congress 33

Society of Sisters v. Pierce, 296 Fed. 928; 268 U. S. 510 58

Southern Bell Telephone Co. v. Town of Calhoun, 287 Fed. 381 57

Standard Fashion Co. v. Magrane Houston Co. 258 U. S. 346 32, 72

Standard Oil Co. v. United States, 221 U. S. 1 21, 31

Statutes:

Clayton Act (38 Stat. 731, Comp. Stat. Sec. 8835g) 26

Sherman Act (26 Stat. 209, Comp. Stat. Sec. 8823) 71

Truax v. Corrigan, 257 U. S. 311 59

United Leather Workers v. Herkert, 284 Fed. 446; 265 U. S. 457 67

United States v. American Tobacco Co. 164 Fed. 700; 221 U. S. 106 20, 21

United States v. Joint Traffic Association, 171 U. S. 505 ..... 41, 65
United States v. St. Louis Terminal Railroad Co. 224 U. S. 409 71
United States v. Prince Line, 220 Fed. 230 72
United States v. U. S. Steel Corporation, 251 U. S. 417 ..... 54, 72
Wilder Mfg. Co. v. Corn Products Refining Co. 236 U. S. 163 32
Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522 45

REFERENCE TO THE OFFICIAL REPORT OF THE OPINIONS DELIVERED IN THE COURT BELOW.

PAGE
Swift and Company v. Federal Trade Commission, 8 F. (2d) 595 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 781.

SWIFT & COMPANY, *Petitioner*,

vs.

FEDERAL TRADE COMMISSION, *Respondent*.

BRIEF AND ARGUMENT FOR PETITIONER.

Certiorari granted November 23, 1925 (R. 1616), brings here for review the judgment and decree of the Circuit Court of Appeals for the Seventh Circuit, entered February 16, 1925 (R. 1611), followed by denial of Petition for Rehearing on October 13, 1925. (R. 1613.) This judgment and decree, for the reasons stated in the separate opinions* of Judges Evans (R. 1603-10) and Alschuler (R. 1610) denied Swift & Company's Petition (R. 1-3) to review and set aside an order of the Federal Trade Commission, entered August 3, 1922, in a certain proceeding entitled "*Federal Trade Commission* v. *Swift & Company*, Docket No. 453."

* *Swift & Co.* v. *Federal Trade Commission*, 8 F. (2d) 595.

STATEMENT OF THE CASE.

The order entered by the Federal Trade Commission on August 3, 1922, thus here for review under Section 11 of the Clayton Act (38 Stat. 734; Comp. Stat., Sec. 8835j) required Swift & Company to:

> "(1) Cease and desist from further violating Section 7 of the Clayton Act by continuing to own or hold, either directly or indirectly, by itself or by any one for its use and benefit, any of the capital stock of the Moultrie Packing Company and of the Andalusia Packing Company, or either of them, and Cease and Desist from holding, controlling and or operating, or causing to be held, controlled and or operated by others for its use and benefit, the former property and business either of the said Moultrie Packing Company or of the said Andalusia Packing Company, which have been held, controlled and operated by respondent and its employees and agents, following and as a result of respondent's unlawful acquisition of the capital stocks of said named corporations; and to that end, respondent shall
>
> (2) So divest itself of all the capital stocks heretofore acquired by respondent, including all the fruits of such acquisitions, in whatever form they now are, whether held by respondent or by any one for its use and benefit, of the Moultrie Packing Company, a corporation, and of the Andalusia Packing Company, a corporation, or either of them, in such manner that there shall not remain to respondent, either directly or indirectly, any of the fruits of said acquisitions, including the control and or operations of said corporations, or either of them, in such manner that there shall not remain to respondent, either directly or indirectly, any of the fruits of said acquisitions, including the control and/or operations of said corporations, or either of them, resulting from such acquisitions and or holdings of such capital stocks.
>
> (3) In so divesting itself of such capital stocks

respondent shall not sell or transfer, either directly or indirectly, any of such capital stocks to any officer, director, stockholder, employee or agent of respondent, or to any person under the control of respondent, or to any partnership or corporation either directly or indirectly owned or controlled by respondent.

(4) Cease and desist from further engagements in unfair methods of competition in violation of an Act of Congress approved September 26, 1914, entitled, 'An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and in so ceasing and desisting, shall Cease and Desist from further suppressing the competition in trade heretofore existing between the Moultrie Packing Company and the Andalusia Packing Company, and between each of said corporations and the respondent, and also Cease and Desist from further holding, owning, controlling and/or operating, directly or indirectly, the plants and businesses of the said Moultrie Packing Company and the Andalusia Packing Company, or either of them, either through direct or indirect ownership and or control of the capital stock of either said Moultrie Packing Company or said Andalusia Packing Company and or through the control and or ownership of the properties, physical assets and businesses of either of said named corporations.

It Is Further Ordered, that the said respondent, Swift & Company, shall within ninety (90) days from the date of service of this order, file with the Commission a report setting forth in detail the manner and form in which it has complied with the order of the Commission herein set forth." (R. 90, 91.)

SPECIFICATION OF ERROR.

1. The order affirmatively shows on its face (by its attempted exercise of jurisdiction over "the control and/or ownership of properties, physical assets and businesses" (R. 90-91) that the Commission exceeded its authority. The power delegated to this administrative agency by Congress is specifically limited, by Section 11 of the Clayton Act, to the entry of an order requiring a corporation "to divest itself of the stock held."

2. The complaint (R. 6-13; 59-65) on which the order is predicated affirmatively shows on its face a lack of jurisdiction of the subject matter on the part of the Federal Trade Commission. The complaint stated as to the Moultrie Plant (R. 61) "than from about November 3, 1917, respondent has operated said plant and business as the plant and business of Swift & Company and does now so operate the same" and as to the Andalusia Plant "that from about March 30, 1918 respondent has operated said plant and business as the plant and business of Swift & Company and does now so operate the same." Therefore, the motion to dismiss made by Swift & Company before the introduction of any evidence (R. 30, 31) should have been sustained.

3. If Section 7 of the Clayton Act be construed as the Federal Trade Commission has construed said section in these proceedings, viz.:

> That a corporation may not openly acquire the going business of a corporate competitor "when the effect of such acquisition may be to substantially lessen competition between the corporation" whose property is so acquired and the corporation making the acquisition—there being no claimed violation of

> the Sherman Act in respect to restraint of trade or attempt at monopoly,

then such construction would render said Section 7 unconstitutional. Therefore, the motion to dismiss, made by Swift & Company before the introduction of any evidence (R. 30, 31) should have been sustained. This motion challenged the constitutionality of the Act if construed or interpreted as the complaint construed said Act.

4. The record contains no evidence which tends to prove that there existed at the time of the filing of the complaint, or at the time of the entry of the order, any inter-corporate stockholding which was in such posture or relationship as to confer jurisdiction under Section 7 or to justify order under Section 11 of the Clayton Act.

The Facts.

The Moultrie plant was built at Moultrie, Georgia, in 1914. (R. 252.) Moultrie was then a town of about 5,000 population.

The Andalusia plant was built at Andalusia, Alabama, in 1916. Andalusia had a population less than that of Moultrie.

The situations at Moultrie and Andalusia were practically identical. Both communities are in relatively central positions in the southern part of their respective states. Thirty years ago the surrounding country was, practically speaking, an unbroken pine forest; the lumber and turpentine business the chief and practically the only industries. (R. 263, 381.) The territory was sparsely settled and pioneer conditions existed—pioneer conditions that were real, and which to a lesser extent continue to this day. Lack of roads, schools, transportation, markets, sound farming methods, good, or even

fair breeding stock are some of the handicaps yet to be overcome.

As soon as the land was partially cleared, cotton was planted. This system continued to the advent of the boll weevil in 1914, '15 and '16. For a few years prior to the erection of these plants, the citizens of these communities saw the boll weevil advancing year by year. (R. 382.) Finally their agriculture was made unprofitable.

At that time live stock raising as an industry did not exist. The few animals raised (not nearly enough for home consumption except during a few months of the fall and winter) were of inferior quality; the hogs were known locally as "razor backs" or "piney woods rooters," and the cattle as "piney woods cows." (R. 964.) Bankruptcy threatened the entire country and all branches of endeavor. Something had to be done to save the situation. The United States Department of Agriculture, the business men, the leading citizens, and the civic bodies recommended a diversification of crops and the production of live stock. But there was no market for live stock. There was not enough live stock in the country to attract a packer, or to cause any one of the companies engaged in that business to erect a plant. The basis of the development of the packing business is to get the live stock first; but it is impossible to promote live stock production unless the producers have someone to whom they may sell their live stock. The citizens of these communities decided to build the packing plants with the hope that when the coordinate development had been brought about they would be able to sell them to someone regularly engaged in that business. (R. 253.)

The reasons for the building of these plants are succinctly stated by T. E. Henderson, president and one of

the organizers of the Andalusia Packing Company. Mr. Henderson was called as a witness by the Commission and testified in response to question by Mr. Taylor, counsel for the Commission (R. 361), as follows:

> "Q. Will you please state which—just state very briefly the circumstances surrounding the organization of the Andalusia Packing Company.
>
> A. The war came on in 1914 and reduced prices of all agricultural products in our country to such a point that our people could not pay us, the banks and merchants and their creditors; we had heavy obligations, directly and indirectly; the boll weevil had made his first appearance—in a very limited way, however, in 1914; in 1915 in a very heavy way, and it was for the purpose of finding some other endeavor that a farmer could engage in by which he would pay his obligations that we decided to establish a packing plant, that he might grow hogs and sell them and realize some money from that source. As an illustration, I might say that normally cotton receipts in our town—in 1915—1914 first, were approximately 14,000 bales. In 1915 we had been reduced to about 2,000 bales, and it was a matter of life and death with us, financially, to find some line of endeavor, some pursuit that the farmer might follow that he could make a livelihood and live and pay his debts. Generally speaking, I would say that that was the cause of the building of this plant."

The reasons for building the Moultrie plant are stated by W. C. Vereen (Commission's witness, R. 252-3). He stated that he was president and one of the moving factors in the organization of the Moultrie Packing Company. In the latter part of 1912 and early 1913, the farmers became greatly discouraged on account of the boll weevil, which they knew would soon reach their territory. The business men of Moultrie, in order to offset this, appointed a committee to investigate the packing business. He was a member of this committee. They went through a number of western plants, came home, and recommended that a plant be built. They went

ahead, raised money and organized the Moultrie Packing Company. It was completed and began to operate in December, 1914. The sole desire of the stockholders was to benefit the community, and their hope was to get it started and then sell it to some packer, who would carry it along and thereby benefit their country and leave the stockholders free to carry on their usual vocations.

On cross-examination (R. 261-2) he stated that, because of the boll weevil, land values were going down and our belief was that if the plant was established, thus opening a market for live stock, this would permit to a considerable extent, a change from cotton to live stock. It worked as they had expected. Conditions improved, the farmers, instead of borrowing money for their spring cotton chopping, would sell some hogs. The stockholders agreed to sell if they could get a satisfactory price, so the plant was sold and in his own words (R. 262):

> "Our people are proud that we made the sale to them, to Swift and Company. Swift and Company have done everything in their power to help the farmers in that section, they have given out bulls, high-grade bulls to be used in that section to improve the live stock, and they have done the same way with chickens. Swift & Company have done just as we expected them to do, they have increased the capacity of that plant, and they have helped in every way to build up that community. No one there regrets the sale of the plant, we are glad of it, they have brought good citizens there, and we would like to get in some more just like them."

At each city a company was organized, with the stock widely distributed in small lots among the farmers and business men. The plants were built, were for sale and were willingly and gladly sold to Swift and Company at a fair price, each and every stockholder assenting to

the sale. (R. 255-8, 265, 365-372.) That there has been no cause for regret is shown by the testimony of the president of the Moultrie Chamber of Commerce, a leading business man and one of the chief organizers of the Moultrie plant, who said:

> "It was the best day's work we ever did as a community when we built the Moultrie plant. It was a better day's work when we sold it to Swift and Company." (Witness Pidcock, R. 868.)

When the southern farmers found their cotton crop unprofitable and turned to live stock raising, small packing plants sprang up in a number of small southern cities, to wit, Moultrie, Georgia; Andalusia, Alabama; Chipley, Florida; Tifton, Georgia; Macon, Georgia; Waycross, Georgia; Jacksonville, Florida; Statesboro, Georgia; Orangeburg, South Carolina; Spartanburg, South Carolina, and Natchez, Mississippi.

Swift and Company did not want to build another plant in the new live stock section of the South. It felt that the available volume of live stock would not justify additional plants. It did not want to interfere with the business of any established plant. (Witness Hunter, R. 1162, 3, 4, 5.)

On May 15, 1917, L. F. Swift, an officer of Swift and Company, met W. C. Vereen, president of the Moultrie Packing Company, at Jacksonville, Florida. Mr. Vereen's version of this conversation is as follows:

> "Mr. Swift and I went very carefully over the section of the country where we got hogs from, and he talked to me at considerable length trying to find out what I thought about their ability to increase the production of live stock in that section of the country. After I satisfied myself that they were going to increase the capacity of the plant and to operate it on, then we came to the price. Finally, we agreed upon that, and I gave him an option upon the stock that I owned myself, and we wrote it up—

he wrote it out himself—a little agreement binding me to try and buy up all the other stock at the same price he agreed to give me for mine. They have done everything in the world that he promised. I never had any dealings with fairer people in my life; they have lived up to every promise, and were just as reasonable in everything as they could be." (Witness Vereen; R. 873, 4.)

"They (the farmers) were very much encouraged when Swift and Company came in and bought the plant; it caused a better feeling around, because the public generally knew that the owners of the old Moultrie Packing Company did not invest their money because they wanted jobs, but they invested it because they took it in as a side line, because they wanted to help this section of the country. They knew when Swift and Company took it that Swift and Company had an unlimited amount of money and they could make it as big as they wanted to, could operate it better than we could. Consequently values, property values, as any one who is familiar with conditions here will tell you, advanced immediately, not only farm lands, but town lands." (Witness Vereen; R. 874.)

The reason, from the buyer's standpoint, for the transfer of certificates of stock to nominees of Swift and Company as a preliminary to the conveyance of physical assets by formal deed and bill of sale is shown in letter from Louis F. Swift to Edward F. Swift, dated May 19, 1917 (Commission's Exhibit No. 6, R. 1242), which is as follows:

"If we do anything with the Moultrie proposition, I should want it understood that we continue to run under the same name for a few months anyhow—until we get acquainted with it; and that absolutely no changes are to be made in their manner of making products—but continue in the same channels for at least one month until we know more about them.

My reason for the above is that there are so many soft hogs that I don't want the question of

Swift and Company's brands involved for the time being."

The reason, from the seller's standpoint, for such transfer to such nominees as such preliminary to formal conveyances is stated, as to the Andalusia Plant, by T. E. Henderson called as a witness by the Commission. Mr. Henderson had produced a copy of the so-called option which he gave to Mr. H. C. Carr, representing Swift and Company. (See Commission's Exhibit No. 111; R. 1398.) In reference to this option, he said that it was the understanding that if he and Mr. Darling (another organizer and director of the Andalusia Packing Company) sold their shares of capital stock to Swift and Company, while he and Mr. Darling were willing to sell at the price named, they were not willing to sell at any price unless it was perfectly satisfactory to all the remaining stockholders to sell their stock at the same price. It subsequently developed that it was satisfactory to all the remaining stockholders and the stock was all sold at $70 a share. (R. 369.)

The object and purpose of all parties to the transaction were to sell both plants to Swift and Company as going concerns. The desire of everyone who participated in the negotiations, whether on behalf of seller or buyer, was to have assurance that there would not be a single dissatisfied or disgruntled stockholder. (R. 256.)

Deeds and bills of sale were not made until each and every stockholder upon identical terms had parted with his stock. Nor did Swift and Company at any time hold direct legal title to the stock in either the Moultrie or Andalusia Company. The negotiations at all times were that Swift and Company should acquire and take over the physical plant, property and assets, providing this could be accomplished by and with the unanimous approval of all stockholders in the respective companies.

As a convenient means to that end the agreed purchase price, when paid, was charged on the books of Swift and Company (Commission's Ex. 29, 30; R. 1273, 1275) to "stock investment account"; new certificates were issued in the names of employees of Swift and Company, whose Law Department was instructed (R. 1242) "to take the necessary steps towards consummating the transfer", which the Law Department was advised was to include "land, buildings and other fixed assets, inventory of product and supplies, accounts, in short, net assets." (R. 1243.)

Pursuant to these instructions the necessary documents were prepared and the following resolution was adopted by the Board of Directors of the Moultrie Packing Company on November 3, 1917. (R. 1283, 1284):

> "WHEREAS, This Company is the owner of a certain meat Packing Plant, located at Moultrie, Georgia, and is operating said plant and engaged in the business of selling the products thereof, and
>
> WHEREAS, this company desires to go out of business and be wound up and liquidated, and
>
> WHEREAS, Swift and Company, an Illinois corporation, has offered to purchase all the business and property of every description and wheresoever situated belonging to this Company, and to pay therefor the book value as shown by the books of this Company at the close of business on November 3rd, 1917, and to assume all the debts, contracts, obligations and liabilities of this Company at the close of business on said date, and
>
> WHEREAS, said offer contains a full and adequate consideration for the same;
>
> NOW, THEREFORE, IT IS HEREBY RESOLVED, That the said business and property be sold to the said Swift and Company for the said sum, and for the further consideration of the assumption by said Swift and Company of all the debts, contracts, obligations and liabilities of this Company as aforesaid, and

RESOLVED, That this Company be wound up and liquidated and its net assets be distributed among the stockholders in proportion to their holdings; and

RESOLVED, That the President of this Company be and he is hereby authorized and directed to take such action as may be necessary to carry into effect these resolutions.

Deed dated November 24, 1917 (R. 1481), and bill of sale dated November 3, 1917 (R. 1483), were executed and delivered to Swift and Company; and on January 5, 1918, this action was approved and ratified at a stockholders' meeting by the unanimous adoption of the following resolution (R. 1286):

"WHEREAS, The Board of Directors of this Company at a meeting held at the office of the Company in the City of Chicago, State of Illinois, November 3, 1917, duly adopted a resolution authorizing and directing the President of this Company to sell to Swift and Company all the business and property of every description and wheresoever situated belonging to this Company at the book value thereof as shown by the books of the Company at the close of business on November 3, 1917, and the assumption by said Swift and Company of all the debts, contracts, obligations, and liabilities of this Company at the close of business on said date, and

WHEREAS, Pursuant to said authority the President of this Company has sold all the business and property of this Company to Swift and Company for the consideration aforesaid; and

WHEREAS, Said price is a full and adequate consideration for the same,

NOW, THEREFORE, IT IS HEREBY RESOLVED, That the action of the Board of Directors and the President of the Company in disposing of the property and business of this Company to said Swift and Company as aforesaid, be and the same is hereby in all respects ratified, approved and confirmed, and

RESOLVED, That this Company be wound up, liquidated and its net assets be distributed among the stockholders in proportion to their holdings, and

RESOLVED, That the Board of Directors of this Company be and they are hereby authorized and directed to take any action that may be necessary to carry into effect these resolutions."

Similar course was followed as to the Andalusia Company. At a meeting of the Directors on March 30, 1918, the following resolution was adopted (R. 1304):

"WHEREAS, Swift and Company, a corporation of the State of Illinois, has offered to purchase all of the property and business of this company at the book value thereof at the close of business Saturday, March 30, 1918, for cash and assume all the debts, liabilities and obligations of this company; and

WHEREAS, it is the judgment of this Board of Directors that the price aforesaid is a full and fair price for the property and business of this company, and it is to the best interest of this company to accept said offer;

THEREFORE, RESOLVED, That said offer be and the same is hereby accepted; and

RESOLVED, FURTHER, That the proper officers of this company be and they hereby are authorized and instructed to convey, assign and transfer to said Swift and Company all of the property and business of this company by proper instruments of conveyance on receipt of the purchase price aforesaid."

Deed (R. 1477) and bill of sale (R. 1480) both dated March 30, 1918, were executed and delivered to Swift and Company in pursuance of this resolution.

In the interim during which the legal formalities were being worked out by the Law Department of Swift and Company to consummate the conveyance of physical assets, the Federal Trade Commission was advised in correspondence with Moultrie Packing Company, in explanation of certain answers on forms prescribed by the Commission, that on October 5, 1917 (Commission's Ex. 99, R. 1373), "We are subsidiary to Swift and Com-

pany"; and after the transfer had been consummated by deed and bill of sale, in response to communication from the Commission addressed to Moultrie Packing Company, dated February 11, 1918, reply to the Commission, dated February 20, 1918, is made over the signature of Swift & Company, on stationery which has the heading "Swift and Company—Moultrie, Ga." (Commission's Ex. 101, R. 1386, 1387.)

Senate Resolution 133, 66th Congress, 1st Session, adopted July 25, 1919, directed the Federal Trade Commission to make immediate investigation of southern live stock prices and marketing conditions. The Report of the Commission in response to such resolution appears as respondent's Ex. 1 (R. 1525-1539) and in such Report appears the following (R. 1533):

> "Simultaneously with the recent development of the live stock industry in the southeastern States, several modern packing plants were established. The records of the Bureau of Animal Industry, July 25, 1919, show that the following slaughtering and packing plants are operating in these States under its inspection, all of which, except the Birmingham Packing Co., have been established within the past five or six years:
>
> Swift & Co., Andalusia, Ala.
> Birmingham Packing Co., Birmingham, Ala.
> A. D. Davis Packing Co., Mobile, Ala.
> Swift & Co., Moultrie, Ga.
> Macon Packing Co. (Allied Packers), Macon, Ga.
> Armour & Co., Tifton, Ga.
> Augusta Packing Co., Augusta, Ga.
> Armour & Co., Jacksonville, Fla.
> Chipley Packing Co., Chipley, Fla.
> Mississippi Packing Co. (Wilson & Co. (Inc.)), Natchez, Miss."

In this case there is involved no question of "bogus independent" or "fake competitor." In fact, the amended complaint specifically charged as to the Moultrie Plant that "from about November 3, 1917, respond-

ent has operated said plant and business as the plant and business of Swift and Company and does now so operate the same." (R. 61.) And as to the Andalusia Plant that "from about March 30, 1918, respondent has operated said plant and business as the plant and business of Swift and Company and does now so operate the same." (R. 64.)

Respondent's Ex. 9 (R. 1553) and Ex. 10 (R. 1555) are photographs. Exhibit 9 shows the plant of the Moultrie Packing Company which was deeded to Swift and Company. Exhibit 10 shows the plant (with the name of its owner "Swift and Company" prominently displayed) which the grantee in the deed of November 24, 1917, has brought into existence through enlargements and extensions. The expenditures for enlargements and extensions are much more than the total original investment.

Just prior to the acquisition, the Moultrie plant was value at about $150,000, while on October 30, 1920, Swift and Company had an investment in said plant and equipment of $1,114,776, having made an expenditure for betterment between the date of acquisition and October 30, 1920, of about $964,000. (Commision's Ex. 57, R. 1324, and Respondent's Ex. 13, R. 1557, 8.)

Just prior to the acquisition, the plant and equipment of the Andalusia Packing Company was valued at about $143,000, while on July 2, 1921, Swift and Company had an investment in the said plant and equipment of about $423,000, having made an expenditure for betterment between the time of acquisition and July 2, 1921, of $280,000. (Respondent's Ex. 27, R. 1571.)

F. R. Pidcock, one of the organizers and stockholders in the Moultrie Packing Company and president of the Moultrie Chamber of Commerce, testified (R. 867, 8):

"This immediate section is in better condition and the land and property values are higher than in any other section of the State of Georgia. If the Federal Trade Commission orders Swift and Company to sell the Moultrie plant, it would mean closing it down. It would not be purchased by anybody here. So far as the people of this community are concerned, they are not able to buy it."

Oscar M. Dugger, president of the Andalusia Chamber of Commerce, and publisher of two newspapers, testified (R. 935-941):

"I was here in Andalusia before the old Andalusia Packing Company began to operate, and have been continuously since, engaged in the newspaper business. I have kept up with market conditions from that time to now. I unhesitatingly state that the prices paid for live stock and general market conditions have been better under the management of Swift and Company than they were under the management of the old company. I know this because I have printed the market quotations in my newspapers and have compared them with markets in other trade centers, such as Chicago. I have correspondents for my newspapers throughout this county and section, and as a public man and as a newspaper man I come in contact with those correspondents and receive information. I have never heard of any dissatisfaction at all among the people of this section or among the stockholders with reference to the operation of the plant by Swift and Company. I would assess the sentiment as unanimous that the change was beneficial for the reason that it was taken over by a concern that was able to finance it, and in such measures that would provide a market for all live stock that the farmers of this section could produce, whereas the capital before was limited, and the amount that it would consume would necessarily be circumscribed; and that fact was sufficient to give a wonderful impetus to the growth and to the raising of hogs and cattle in this territory. To my knowledge, right after Swift and Company purchased this plant they improved it. They made great improvements in the plant and the

facilities, and a very marked increase in the number of persons employed to take care of them and the facilities for handling live stock. From my observation and my knowledge of conditions, after Swift and Company purchased the plant there was no tendency to suppress competition in the buying and selling of live stock, or the finished product; nor was there any suppression of competition. So far as my knowledge goes, it gave impetus to competition in that it became known that they were in the cattle and hog business here, which served to bring in more buyers, and the sales (hog sales) have increased in the various county seats around here. That was something we never heard of prior to their coming here and establishing a market for hogs and cattle all over this section. Buyers came here and have been attracted here, and it has improved the cattle and hog conditions and the quality also.

Swift and Company has had this plant since 1917. With their experience in the operation and their familiarity with this section of the country on account of that four years of experience, in my judgment no other packer, or no other association or people could operate the plant with so much benefit to the general public as Swift and Company on account of this experience. Others would have to learn it, take it up and learn what these people already know; that is, regarding local conditions and handling the people, and all like that, as you have to learn the territory."

The testimony of these two witnesses is thus excerpted in order that the Court may obtain therefrom the trend and tenor of the corroborating testimony given by many leading business men of the communities who were called as witnesses by respondent. (R. 847-986.)

Since the acquisition Swift and Company operated the two plants continuously to the date of taking testimony, with the following results:

Moultrie (Respondent's Ex. 18, R. 1562):

1918	Loss	$273,768.22
1919	Loss	259,477.93
1920	Loss	214,871.89
1921	(8 Months) Loss	231,011.87

Andalusia (Respondent's Ex. 23, R. 1569):

1917	August, September and October	$ 3,749.59	Profit
1918	52 weeks	120,422.96	Loss
1919	52 weeks	195,157.54	Loss
1920	52 weeks	172,386.53	Loss
1921	35 weeks	173,579.72	Loss

Corroboration of the fact that the "section or community" (38 Stat. 731, Comp. Stat. 8835g) directly affected by the order of the Commission esteems such order injuriously destructive of the economic welfare of said "section or comunity," and in no manner remedial, is given by the attempted intervention of the Moultrie Chamber of Commerce (R. 34-38) and of the Andalusia Chamber of Commerce (R. 40-47). While the Commission (R. 40-48) denied both petitions for intervention yet the Circuit Court of Appeals granted leave (R. 1602) to counsel for these Chambers of Commerce to appear *amicus curiae* and file brief; and in the Circuit Court of Appeals both opinions seemingly recognize that economic loss rather than economic gain to these sections and communities will result from enforcement of the order of the Federal Trade Commission.

In the opinion by Judge Evans (R. 1603-10) it is said at page 1607:

> "Nor are we, in construing this legislation, called upon to pass judgment respecting its wisdom. Conceding that the Congress was authorized under the commerce clause and other sections of, or amendments to, the Constitution, to deal with the subject matter, it alone could determine the wisdom of such legislation and make such exceptions or reserva-

tions as it deemed the needs of commerce, and the welfare of the public, required.

We are, therefore, confronted with a simple legal question, one of statutory construction. We must divorce it from the associated economic questions." (8 F. (2d), 597.)

In the opinion by Judge Alschuler it is said (R. 1610):

"The apparent considerable benefit to the localities from the increased manufacturing activities there, which followed the transactions complained of, illustrates the possible hardship and resultant embarrassment in strictly applying the statute in accordance with its plain and comprehensive terms." (8 F. (2d), 599.)

It is respectfully submitted that the opinions of the Circuit Judges in this case, in their construction of the Clayton Act, bear striking similarity to the opinion of the Circuit Judges in New York in the *American Tobacco case* in their construction of the Sherman Act. In the latter case (*United States v. American Tobacco Co.*, 164 Fed. 700) it was said (701-2):

"By insensible degrees, under the operation of many causes, business, manufacturing and trading alike, has more and more developed a tendency toward larger and larger aggregations of capital and more extensive combinations of individual enterprise. It is contended that, under existing conditions, in that way only can production be increased and cheapened, new markets opened and developed, stability in reasonable prices secured, and industrial progress assured. But every aggregation of individuals or corporations, formerly independent, immediately upon its formation terminates an existing competition, whether or not some other competition may subsequently arise. The act as above construed prohibits every contract or combination in restraint of competition. Size is not made the test: Two individuals who have been driving rival express wagons between villages in two contiguous states, who enter into a combination to join forces and operate a single line, restrain an existing competition; and it would seem to make little difference

whether they make such combination more effective by forming a partnership or not.

Accepting this construction of the statute, as it would seem this court must accept it, there can be little doubt that it has been violated in this case."

But when the *American Tobacco case* was brought to this Court for review (221 U. S. 106) not only did this Court refuse to give approval to such interpretation of the Sherman Act, but the position taken by counsel for the Government in their brief is summarized as follows, 221 U. S. at pages 115 and 116:

"The Government does not maintain that restraint, obstruction or hindrance of commerce is denounced by the act unless direct and material either in tendency or effect; and, of course, do not insist that every contract or arrangement which merely eliminates a competitor in interstate trade is for that sole reason unlawful. The statute was intended to foster, not destroy, business operations universally regarded as promotive of public welfare. The suggestion that the statute denounces as criminal every party to any sort of contract which eliminates any independent dealer in interstate commerce however insignificant is untenable. But when, as in the present case, the restraint is the direct consequence of or that to which the challenged contract or combination necessarily tends, and is also of a material or substantial character it is clearly within the prohibition. The Government does not avouch and will not attempt to support this extreme construction which was adopted by the presiding judge below."

Seemingly counsel for the United States, when taking the above position in their brief in this Court in the *American Tobacco case*, must have foreseen that the extreme construction of the Sherman Act which they declined to avouch "cannot be constitutionally applied, because to do so would extend the power of Congress to subjects *de hors* the reach of its authority to regulate commerce." (*Standard Oil Co.* v. *United States*, 221 U. S. 1, 68.)

SUMMARY OF ARGUMENT.

I.

SECTIONS 7 AND 11 OF THE CLAYTON ACT DO NOT PURPORT TO CONFER POWER OR JURISDICTION UPON THE FEDERAL TRADE COMMISSION OVER PLANTS AND PROPERTIES OR PHYSICAL ASSETS; AND THE DEBATES OF CONGRESS AFFIRMATIVELY SHOW THAT CONGRESS HAD NO INTENTION TO CONFER SUCH POWER OR JURISDICTION.

Congress has not delegated to its administrative agency designated as Federal Trade Commission, any power over the ownership of "plants, properties and physical assets." The question of the legality of ownership or operation (in so far as any claimed illegality of ownership or operation is because of Federal Anti-Trust laws) has been committed by Congress to the Federal Courts for determination in "proceedings in equity" instituted by the Attorney General of the United States under Section 4 of the Sherman Act (26 Stat. 209), wherein such Federal Court of Equity may make such "order or prohibition as shall be deemed just in the premises."

The intent of Congress is clearly expressed. Section 7 of the Clayton Act precisely defines certain specific situations arising out of intercorporate stockholding wherein the administrative agency is authorized to issue a single and exclusive form of remedial order which Section 11 defines with like precision, viz, "divestiture of stock held."

Even if the language of Sections 7 and 11 were not so clear and unambiguous and even if resort be had to the debates of Congress we find that it was the intention of

Congress, through enactment of Section 7 of the Clayton Act to prohibit, under certain conditions, the purchase of capital stock by "holding companies" and thus to prevent a specific economic evil viz, "the operation of bogus independent companies."

Likewise, in case resort be had to the debates of Congress we find that Congress intended to prohibit purchases of capital stock only in the event that interstate commerce was, through such purchases, directly, substantially and injuriously affected.

II.

TO CONSTRUE SAID SECTIONS 7 AND 11 AS THE FEDERAL TRADE COMMISSION HAS CONSTRUED THEM IN AND BY THE ORDER UNDER ATTACK WOULD MAKE IT NECESSARY TO CONSIDER GRAVE CONSTITUTIONAL QUESTIONS WHICH DO NOT ARISE IF SAID SECTIONS ARE CONSTRUED TO MEAN PRECISELY AND ONLY WHAT THEY SAY.

The source of congressional authority to enact the Clayton Act is the Commerce Clause of the Constitution (Sec. 8, Art. 1) which gives Congress power "to regulate commerce."

Sections 7 and 11 of the Clayton Act are subject to no unconstitutional infirmity if said sections are interpreted to mean what they clearly say, viz:

> That they apply to and cover only situations wherein the facts, judicially ascertained and determined, show that corporate ownership of stock is so postured as to create a direct and substantial obstruction in the current of interstate commerce and which obstruction will be removed from such interstate current by change in the ownership of such stock.

But to place upon said sections the strained construction necessary to uphold the order of the Commission

would at once raise the grave and doubtful constitutional questions:

1. May Congress prohibit a property owner from selling his property and going business to a competitor, merely because the effect of such sale "may be to substantially lessen competition between" the seller and the buyer?

2. If this question should be answered in the affirmative then may Congress forbid a corporation from openly acquiring the property and going business of a corporate competitor, under circumstances wherein the transaction would be inoffensive to the law if seller or buyer, or both, were individuals—the respective positions in the trade, and the instrumentalities used in commerce of the respective corporate and individual vendors and vendees being precisely the same? In other words, may the law forbid to corporations, solely because they are corporations, what it permits to individuals in identical circumstances?

III.

THE CLAIM BY AND FOR THE FEDERAL TRADE COMMISSION THAT SUCH COMMISSION HAS IMPLIED JUDICIAL POWER IS WITHOUT FOUNDATION.

So long as we keep in mind the fundamentals guaranteed by the Constitution,

(A) That an administrative agency of Congress cannot be given judicial power;

(B) That discriminations between corporations and individuals, in Federal legislation based upon the Commerce Clause, must be founded on some real difference in the manner by which corporations and individuals affect interstate commerce; and

(C) That Federal power to legislate under the Commerce Clause exists only if and when legislation reaches matters, subjects, and things which directly—not incidentally and collaterally—affect and thus regulate interstate commerce,

we have no difficulty in so interpreting Sections 7 and 11 of the Clayton Act as to preserve them from constitutional objection, and these sections can be thus preserved only by rejecting the Commission's conception of its power, as evidenced by the order herein, because such conception is oblivious of constitutional guarantees.

ARGUMENT.

I.

SECTIONS 7 AND 11 OF THE CLAYTON ACT DO NOT PURPORT TO CONFER POWER OR JURISDICTION UPON THE FEDERAL TRADE COMMISSION OVER PLANTS AND PROPERTIES OR PHYSICAL ASSETS; AND THE DEBATES OF CONGRESS AFFIRMATIVELY SHOW THAT CONGRESS HAD NO INTENTION TO CONFER SUCH POWER OR JURISDICTION.

The portions of the Clayton Act here pertinent are found in Sections 7 and 11 (38 Stat., 731-4; Comp. Stat. Secs. 8835g, 8835j) and read as follows:

> "SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
>
> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
>
> This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substan-

tial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

SECTION 11. * * * If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its

> findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and *divest itself of the stock held* or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. * * * The court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree affirming, modifying or setting aside the order of the commission or board." (Italics ours.)

It is to be noted that in the second paragraph of Section seven above quoted, after repeating the prohibitive language of the first paragraph, there is added:

> "Where the effect of such acquisition or the use of such stock by the voting or granting of proxies or otherwise, etc."

It is to be further noted that in the third paragraph of said Section seven, exception is made in favor of "corporations purchasing such stock solely for investment and not using the same by voting or otherwise," etc. And in the same paragraph, in the clause concerning subsidiaries, permission is given for "owning and holding all or a part of the stock of such subsidiary."

It is to be further noted that Section eleven provides a specific statutory remedy for the removal (if and when found to exist) of restraint upon competition between existing competitors in its provision that the specific statutory order in such event shall be that the corporation thus found to be restraining the normal activities of its competitor through stock ownership shall "divest itself of the stock held."

The words "where the effect of such acquisition may be to substantially lessen competition between the cor-

porations whose stock is so acquired and the corporation making the acquisition" are clearly intended to cover only the situation where two or more ostensible competitors are found, by reason of their intercorporate stockholding relationship, not to function with the normal competitive activity which would exist were it not for such intercorporate stockholding relationship.

Thus the provisions of this paragraph contemplate (a) the existence of two corporations which are competitors in the same line of business; (b) that one of them buys the stock or other share capital of the other; (c) that such other continues functioning in ostensible competition with the corporation making the acquisition; (d) that between the two corporations competition is substantially lessened; (e) that such substantial lessening of competition is the effect of such acquisition; and (f) that such lessened competition may be restored to its normal state by application of the statutory remedy provided in Section eleven whereby the corporation which acquired the stock may be ordered to "divest itself of the stock held."

In the case of *Aluminum Company of America* v. *Federal Trade Commission*, 284 Fed. 401 (certiorari denied 261 U. S. 616), the majority of the court disagreed with Judge Buffington *as to the facts* which created the premise from which Judge Buffington, in his dissenting opinion, reached the conclusion that the Federal Trade Commission was without jurisdiction; but the majority of the court seemingly makes clear the fact that their disagreement with Judge Buffington is not with reference to the true legal interpretation of the first paragraph of Section seven, but is rather that in the view of the majority of the court the facts in the *Aluminum Company case* came within said first paragraph as defined and

analyzed by Judge Buffington. Thus, in the majority opinion, it is stated, at p. 406:

> "We are of opinion that the findings of the Commission that there was competition between the Aluminum Company and the Cleveland Company during the period in controversy is supported by the testimony."

Again, on page 407, the majority opinion states:

> "But curtailing this discussion, we are not prepared to admit the premise from which the Aluminum Company deduces its conclusion. In other words, we do not find that at the time the Aluminum Company acquired the stock of the Rolling Mills Company the latter was not engaged in commerce and was not, potentially, engaged in competition with the Aluminum Company, for these reasons:" etc.

As we view it, the difference between the majority of the court and Judge Buffington is not concerning the true construction of the first paragraph of Section seven, but rather concerning the applicability of the facts in the *Aluminum Company* case to the said paragraph, as thus construed. Judge Buffington says, at page 409, after quoting the first paragraph of Section seven:

> "These plainly expressed provisions contemplate the existence of two corporations which are competitors in the same line of business, and one of them, with the view to substantially lessening competition or creating a monopoly, buying the whole or a part of the stock of its competitor. That two existing competing corporations were the subjects of the clause, is shown plainly by its terms. The offending buying corporation is aptly described as being in business, by the words 'no corporation engaged in commerce,' and the other corporation is described as being in like manner engaged in commerce by the words 'another corporation engaged *also* in commerce,' and that the two corporations thus described were each actually engaged in competition of a substantial character, is evidenced by

the fact that the stated object of the law was to prevent the two corporations engaged in commerce from doing a thing 'the effect of which was to *substantially lessen* competition,' or which tended 'to create a monopoly of any *line of commerce.*' Moreover, the word 'acquire' is an apt one to describe the buying by one corporation of the stock of another competing corporation, as will be seen by reference to the proviso in the third paragraph that 'this section shall not apply to corporations *purchasing such stock* solely for investment and not using the same by voting or otherwise to bring about, or any attempt to bring about, the substantial *lessening of competition,*' and also by reference to Section 11 of the act (Comp. Stat. Sec. 8835j), where the remedy against the stock-acquiring corporation is 'to cease and desist from such violations and *divest* itself of the stock held.' Such divesting would restore the competitive corporation to its former competing status.

Clearly, such was the situation to which this section was directed, but lest the stock of two or more corporations thus engaged in competition, should be bought up not by one another, but a holding company which was not engaged in commerce, the next paragraph was added, which provided:

> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

In *Standard Oil Co.* v. *United States*, 221 U. S. 1, Chief Justice White enumerates, at pages 41-43, some of the means or devices by which defendant sought to restrain trade and attain monopoly. In such enumeration the Chief Justice sets forth the holding company (p.

41), preferences and discriminations (p. 42), local price cutting (p. 43), and "the operation of bogus independent companies" (p. 43).

As was stated by Mr. Justice Day, in *Standard Fashion Co.* v. *Magrane-Houston Co.* 258 U. S. 346, 355:

> "The Clayton Act, as the title and the history of its enactment disclose, was intended to supplement the purpose and effect of other anti-trust legislation, and principally the Sherman Act of 1890. The latter act has been interpreted by this court to apply to contracts, combinations and conspiracies which unduly obstruct the free and natural flow of commerce."

And it was clearly intended (and, as we submit, clearly stated) by the Clayton Act, to arrest, by specific directions to an administrative agency, *certain practices* or methods theretofore found, under certain circumstances, to have been efficient in unduly restraining trade and in furthering attempts to monopolize. Accordingly, Congress enumerated, in the Clayton Act, most of *the practices* set forth in the opinion in the *Standard Oil case* (pp. 41-43) and by Section 7 (as we contend) legislated against the "holding company" and the "bogus independent," and set up as the single, exclusive writ of execution against *this practice* an order that the company restraining the free play of competition through stock ownership "divest itself of the stock held."

In *Wilder Mfg. Co.* v. *Corn Products Refining Co.* 236 U. S. 163, Mr. Chief Justice White denied the right of an individual litigant to invoke, in civil litigation, the provisions of the Sherman Anti-Trust Act. He says (p. 174) it is familiar doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes"; and cites in support of this "familiar doc-

trine" the cases *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, 35; *Barnet* v. *National Bank*, 98 U. S. 555; *Oates* v. *National Bank*, 100 U. S. 239; *Stephens* v. *Monongahela Bank*, 111 U. S. 197; *Tenn. Coal Co.* v. *George*, 233 U. S. 354, 359.

THE CONSTRUCTION ESSENTIAL TO SUPPORT THE ORDER OF THE COMMISSION DOES VIOLENCE TO THE LEGISLATIVE PURPOSE IN PASSING SECTION SEVEN.

(a) *It was the intention of Congress, through enactment of Section 7 of the Clayton Act to prohibit, under certain conditions, the purchase of capital stock by "holding companies" whereby there was brought about "the operation of bogus independent companies."*

In the report from the Committee on the Judiciary, submitted July 22, 1914, Senate Report 698, 63d Congress, Second Session, it is stated, the purpose of the Clayton Act is to supplement the Sherman Anti-trust Act of July 2, 1890, and other anti-trust legislation. Continuing, the report states:

> "Broadly stated, the bill, in its treatment of unlawful restraints and monopoly, seeks to prohibit and make unlawful *certain trade practices*, which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890, or other existing anti-trust acts, and thus, by making *these practices* illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency, before consummation. Among others of these *trade practices* which are denounced and made unlawful may be mentioned discrimination in prices for the purpose of wrongfully injuring or destroying the business of competitors; exclusive and tying contracts; *holding companies;* and interlocking directorates."

That it was *a definite trade practice*, namely "the operation of bogus independent companies" by and through the action taken by "holding companies" in

unduly lessening competition and restraining trade, that Congress had in mind, is conclusively shown by reference to page 13 of the report of this committee, where what is now Section 7 of the Clayton Act (then Section 8) is fully explained as follows:

> "Section 8 deals with what is commonly known as the 'holding company,' which is a common and favorite method of promoting monopoly. 'Holding company' is a term, generally understood to mean a company that holds the stock of another company or companies, but as we understood the term a 'holding company' is a company whose *primary* purpose is to hold stock of other companies. It has usually issued its own shares in exchange for these stocks, and is a means of holding under one control the competing companies whose stocks it has thus acquired. As thus defined a 'holding company' is an abomination and in our judgment is a mere incorporated form of the old-fashioned trust. Most of the corporations engaged in interstate commerce are organized under the laws of one or the other of the states. It is right that this should be so, and it is right that the various states, each of which has the right to exclude corporations of any other state from its borders, should exhibit comity to these other states, and that the Federal Government, which perhaps has the right to exclude corporations of any state from interstate commerce, should exhibit comity to all the states.
>
> At common law a corporation had no right to own stock in another corporation, but from time to time the various states have by special statutes, permitted it, until now certainly more than a majority of all the states permit corporate stockholding either generally or of certain kinds and under certain conditions. This legislation in its early operation may have served a useful, economic purpose. Trade and commerce could do as well without steam and electricity as without the idea of the commercial unit which is embodied in the word 'corporation.' Hence there are certain corporations which may properly be interested with individuals other than its own stockholders, but experience has taught

> us that *the 'holding company' as above described* no longer serves any purpose that is helpful to either business or the community at large *when it is operated purely as a 'holding company.'* Section 8 is intended to eliminate this evil so far as it is possible to do so, making such exceptions from the law as seem to be wise, which exceptions have been found necessary by business experience and conditions, and the exceptions herein made are those which are not deemed monopolistic and do not tend to restrain trade." (Italics ours.)

In the text entitled "Business Organizations and Combinations," by Louis H. Haney, formerly an examiner of the Federal Trade Commission, we find the holding company defined as follows (page 216):

> "*Definition and General Nature.* A holding company is a form of business organization (established through partial or temporary consolidation) which is created for the purpose of combining other corporations by owning a controlling amount of their stock. It necessarily involves the creation or the prior existence of a corporation which has power to hold the stock of other corporations, which corporation proceeds to acquire such stocks by exchanging its own securities for them, or by other means of purchase. *The controlled corporations are nominally independent and operate under their own names*, but they are or can be effectively managed by the officers of the holding company, whose directors vote their stocks, or a controlling part thereof, and so elect their directors. In this way, the combined plants are firmly bound together. The holding company is organized just as any other corporation, *but its purpose—at least its chief purpose—is merely to hold the stocks of other and subsidiary companies.* 'The attitude of these combinations is that of a stockholder in many corporations which seeks to manipulate them so as to promote its own private interest.'"

Again, we find by reference to page 46 of the report of the Committee on the Judiciary of the House, a further statement showing it was the intention of Congress

that this section should prohibit interference with trade and commerce, or the creation of a monopoly, through the operation of "*holding companies.*" The report states:

> "SEC. 8. This is the section of the bill directed against what are termed *holding companies*, and the object of the measure is stated in the report of the Committee on the Judiciary of the House of Representatives, heretofore reproduced herein and to which reference is now again made."

Likewise, we find throughout the debates in Congress upon Section 8 (now Section 7) of the Clayton Act, senators and representatives continually refer to such section as the "*holding company*" provision of the act. For example, Senator Nelson, one of the conferees, said:

> "This permits a *holding company* to buy the stock of any other company and hold it as a matter of investment, and unless you can show that it has been done *for the purpose of substantially lessening competition, the company is not liable.*"

Excerpts from Congressional Record, August 27, 1914, pp. 14315, 6:

> "Mr. Cummins: * * * I have always very much doubted whether we needed any additional legislation with regard to what are ordinarily known as holding companies; that is, where one company holds the stock or controls the stock of two or more corporations which are engaged in competitive business. * * * We forbid, in the first place, intercorporate stockholding where the effect would be to substantially lessen competition as between two corporation. We proceed to make an exception to that rule in this proviso that eliminates subsidiary corporations. Therefore it is evident that the framers of the section thought there was some subsidiary corporation which would fall within the operation of the first part of the section unless expressly withdrawn. * * * The corporation that is here called upon to act must undertake to say, first, whether the aquisition of the stock of another corporation will substantially lessen competition

between them. It must first undertake to say whether they are competitive in character, then whether the acquisition of stock will substantially lessen the rivalry between them. Then it must undertake to decide whether the one is a subsidiary corporation, whether it is really a branch or carrying forward of business in which the parent corporation, if I may use that term, is engaged. * * * I cannot quite agree with the Senator from Montana. Suppose there were a hundred corporations engaged in a certain kind of business scattered all over the United States. I do not believe it would be a violation of the anti-trust law for one corporation of the hundred to sell out to another. There would still remain in all probability, that full and substantial competition which the anti-trust law requires. I do not think that the anti-trust law condemns every lessening of competition; otherwise it would have to be construed to mean that one concern could not under any circumstances buy or absorb another. I think it depends on circumstances whether such a transaction can lawfully occur or not.

Mr. Walsh: That, of course, is qualified by the clause where the effect is to substantially lessen competition.

Mr. Cummins: It would lessen competition as between the two but, of course, if one had a right under the law to buy out the other it could not be any offense against the law, as it is now, for one to acquire the control of the other. It is just that case that we want, as I think, to prohibit, so that if a consolidation can lawfully occur under the anti-trust laws, it shall be an open, public consolidation, so that everybody can know what is transpiring. * * * I do not believe that is the proper construction of the anti-trust law; otherwise there could be no sale of business. I think there can be, but *wherever the law permits the sale of the business then it ought to be open and public, and a corporation ought not to acquire control of a business simply through the purchase of the stock of a company which continues under its own name, and, so far as the public knows, is independent in its man-*

agement. That is what I think this section is intended in the main to prevent." (Italics ours.)

From this the conclusion is inevitable that it was never the intention of Congress to forbid the stockholders of a corporation, which might be distributing a portion of its products in interstate commerce, from selling their entire holdings of capital stock to a corporation,—even though the purchaser was a competitor also engaged in interstate commerce—which would take over and operate the business under its own name as owner thereof. Congress intended to forbid the acquisition of a portion of the capital stock or all of the capital stock of another company by a "*holding company*" where such stock control was acquired, or was used, *for the purpose and with the intention of lessening competition between the buyer and seller, or restraining trade or commerce or creating a monopoly.* By Section 7 of the Clayton Act Congress intended to prevent the substantial lessening of competition and restraint of interstate commerce, by and through use of a well known, recognized method of accomplishing such results, viz., through the indirect means known as "holding companies," or (in the language of Chief Justice White in 221 U. S. 43) "the operation of bogus independent companies" whose primary intention, purpose and procedure was that of acquiring capital stock in a competing corporation for the ulterior object of substantially lessening competition or restraining trade and commerce.

(b) *It was the intention of Congress, through enactment of Section 7 of the Clayton Act, to prohibit, under certain conditions, purchases of capital stock only in the event interstate commerce would be directly, substantially and injuriously affected thereby.*

By reference to the debates as to the understanding and intention of Congress in enacting this section of the

Clayton Act, we find the following statement by Mr. Flood of the House conferees as to the reason for placing in the bill the word "substantially" (Congressional Record, October 8, 1914, page 16318):

> "And since the gentleman has asked me that question, I desire to take up now briefly that part of the report covering Sections 2, 3 and 7. * * * We have been criticized for injecting or inserting certain words into Sections 2 and 3 in conference. Where did those mysterious words 'substantially lessen competition or tend to create a monopoly' originate? They were incorporated in Section 8, the holding company provision of the bill as it passed this House. They passed muster in the Senate of the United States and were retained in the holding-company provision as it passed the Senate and were retained in conference. In modifying and changing Sections 2 and 3, so as to make the acts prohibited therein unlawful, without making them penal, it became necessary to change the wording of each, in other respects. We took the language that had been already approved by both the House and the Senate in another section, the one relating to holding companies, and applied it to Sections 2 and 3, the latter corresponding to our Section 4, so that the three sections namely, Sections 2, 3 and 7 of the conferference report are in harmony now, all dealing with the questions of contracts, the same principle being applied to each one of them.
>
> The genetleman from Minnesota (Mr. Volstead) criticizes this language and criticizes these provisions, claiming that we are in some way interfering with the operations of the Sherman anti-trust law; at least he fears we are. Not at all. That language did not originate with our committee. That language originated from a discussion in the opinion of the Supreme Court of the United States in the case of the *Addyston Pipe & Steel Co.* v. *United States*. The Court, in discussing this very question of contracts, uses this language: I quote: 'But it has never been, and in our opinion ought not to be, held that this could include the right of an individual to enter into private contracts upon all subjects, no

> matter what their nature and wholly irrespective among other things, of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of an act of Congress upon that subject. The provision in the Constitution does not as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into these private contracts which directly and *substantially*, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the states.' Here is the origin of the application of that word 'substantially'."

Turning to the decision of the Supreme Court in *Addyston Pipe & Steel Co.* v. *U. S.* 175 U. S. 211, we find in addition to the quotation given by Representative Flood, other statements by the Court which serve to define the meaning of the word "substantially," as used in Section 7, *supra*, viz:

> "Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be when carried out, to directly, and not as a mere incident regulate to any *substantial* extent interstate commerce."

From these statements of Congressman Flood and those made by other members of the Senate and House during debate, it is evident that Congress, in drafting Section 7 of the Clayton Act, adopted as its guide decisions of the Supreme Court, declaring that under the Commerce Clause of the Constitution, the power of Con-

gress to legislate extended only to those matters and things *which directly and substantially—not incidentally and collaterally,—affect interstate commerce.*

The same principle was declared by the Supreme Court in the case of *U. S. v. Joint Traffic Association*, 171 U. S. 505, 567, as follows:

> "We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory or shop, or the withdrawal from busines of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans Missouri case* as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered in for the purpose of enhancing the price at which the vendor sells his business. * * * An agreement entered into for the purpose of promoting legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such trade or commerce is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, directly or remotely, some bearing upon interstate commerce, and possibly to restrain it.'"

(c) *The real effect of upholding the Commission's order herein would be to obtain for the Commission, through judicial construction, power and authority over conveyances of physical properties which the Commission requested Congress to confer by additional legislation.*

The Federal Trade Commission, in its Conference Rul-

ings appearing in its Bulletin No. 1 of January 31, 1916, gives as Conference Ruling No. 8 the following:

> "*The right of one manufacturer engaged in interstate commerce to buy out a competitor, and jurisdiction of the commission in such matters.*—On inquiry as to the right of one manufacturer to buy out a competitors in the same line of business: *Held:* That the only jurisdiction of the commission in respect of such transaction is to enforce the provision of section 7 of the Clayton Act prohibiting the acquisition by any corporation engaged, in interstate commerce of the capital stock, in whole or in part, of another corporation thus engaged, where the tendency of such acquisition may be to substantially lessen competition between such two corporations, or to restrain interstate commerce, or to create a monopoly; and also possibly to enforce section 5 of the Federal Trade Commission Act, if such purchase either of property or of capital stock in connection with other circumstances might constitute an unfair method of competition. *Held, also,* That the mere purchase of the property of such competitor other than capital stock is not prohibited by the Clayton Act or the Federal Trade Commission Act."

The members of the Federal Trade Commission sought to have the law amended so as to give the Commission jurisdiction over transactions such as the one here involved. Members of the Federal Trade Commission appeared before the Committee on the Judiciary of the House of Representatives (66th Congress) on September 8 and 9, 1919. On page 21 of Serial 5 of the hearings Mr. Victor Murdock, a member of the Federal Trade Commission, testified as follows:

> "Now, in section 7, Clayton Act, Mr. Chairman, Congress provided against a corporation's acquisition of stock in competing companies. I think at the time Congress passed that act it was a wise piece of legislation. But section 7 of the Clayton Act certainly needs strengthening now, because section 7 does not include the word 'property.' * * * But

> the Government cannot win where there is an acquisition of property instead of an acquisition of stock as the law stands to-day."

The view we urge concerning the correlation between Sections 7 and 11 of the Clayton Act is clearly and succinctly stated at page 13 of the brief of James M. Beck, solicitor general, W. H. Fuller, chief counsel, Edward L. Smith, attorney, for Federal Trade Commission, filed in U. S. Supreme Court, February 19, 1923, in successful resistance of application for certiorari, in the case of *Aluminum Company of America* v. *Federal Trade Commission*, 261 U. S. 616, as follows:

> "There is nothing in the Clayton Act which permits the Commission, when it finds a violation of Section 7 of the Clayton Act, to make any order other than one requiring the corporation which has illegally acquired stock to divest itself of such stock; and it would seem that a Circuit Court of Appeals has no right under the power of modification given to it by the act, to enter any order excepting one which requires a divestiture of the stock illegally acquired."

It is respectfully submitted that to both Sections 7 and 11 of the Clayton Act there is pertinently applicable the language of Mr. Justice McReynolds in *Margolin* v. *United States*, 269 U. S. 93, at p. 102:

> "The history of the enactment indicates plainly enough that Congress did not fail to choose apt language to express its purpose."

II.

TO CONSTRUE SAID SECTIONS 7 AND 11 AS THE FEDERAL TRADE COMMISSION HAS CONSTRUED THEM IN AND BY THE ORDER UNDER ATTACK WOULD MAKE IT NECESSARY TO CONSIDER GRAVE CONSTITUTIONAL QUESTIONS WHICH DO NOT ARISE IF SAID SECTIONS ARE CONSTRUED TO MEAN PRECISELEY AND ONLY WHAT THEY SAY.

The only provision of the Constitution which authorizes Congress to declare unlawful the acquisition and ownership of capital stock of a private corporation, or to justify a Federal Statute ordering that, in certain circumstances, the owner "divest itself of the stock held" is that contained in Article 1, Section 8 which gives Congress power "to regulate commerce."

We respectfully submit that Sections 7 and 11 of the Clayton Act, deriving their validity from the grant of power to Congress "to regulate commerce", must be interpreted to mean that they apply to and cover only situations wherein the facts, judicially ascertained and determined, show that corporate ownership of stock is so postured as to create a direct and substantial obstruction in the current of interstate commerce and which obstruction will be removed from such interstate current by change in the ownership of such stock.

In defining the limit of congressional authority to regulate commerce, this Court has drawn a clear distinction between commerce and manufacture, as well as between transactions which directly and substantially, and those which indirectly and incidentally, are related to or affect interstate commerce. The need for such distinction is imperative, for as regards most business transactions, "There would scarcely be an agreement or con-

tract among business men that could not be said to have, directly or remotely, some bearing upon interstate commerce, and possibly restrain it." *United States* v. *Joint Traffic Association*, 171 U. S. 505-557.

As Mr. Justice Holmes once remarked: "Commerce depends upon population but Congress could not, on that ground, undertake to regulate marriage and divorce." *Northern Securities Co.* v. *U. S.* 193 U. S. 402.

We are not here dealing with property of an interstate character, such as that involved in the *Northern Securities Case*, *supra*, where Mr. Justice Harlan said:

> "Railroad companies, we said in the *Trans-Missouri Freight Association case*, 'Are instruments of commerce and their *business is commerce itself*,' and such companies, it must be remembered, operate public highways, established primarily for the convenience of the people, and are, therefore, subject to governmental control and regulation. * * * When such carriers, in the exercise of public franchises, engage in the transportation of passengers and freight among the States, they become—even if they be State corporations—subject to such rules as Congress may lawfully establish for the conduct of interstate commerce."

The business of the packer is not affected with a public interest or impressed with a public use. That business stands before the law affected by exactly the same considerations as does the business of any other ordinary manufacturer.

In *Chas. Wolff Packing Company* v. *Court of Industrial Relations of the State of Kansas*, 262 U. S. 522, the validity of the Court of Industrial Relations Act of Kansas was before the Court.

This act among other things declared:

> "the following to be affected with a public interest: First, manufacture and preparation of food for human consumption; * * *"

Counsel for the State in his argument before this Court contended:

> "Many millions of our people are wholly dependent upon the continuous and efficient operation of the packing industry for their daily ration of meat. Millions of live-stock growers are dependent upon the continuous and efficient operation of the same industry, for a market for their live stock. All this has impressed with a public interest the packing industry. * * * *The packing industry is affected with a public interest. It has been made the subject of congressional action as evidenced by the Packers and Stockyards Act* of 1921. *Stafford* v. *Wallace*, 258 U. S. 495." (527)

In passing upon this question the court, by Mr. Chief Justice Taft, said (p. 536):

> "It is urged upon us that the declaration of the legislature that the business of food preparation is affected with a public interest and devoted to a public use should be most persuasive with the court and that nothing but the clearest reason to the contrary will prevail with the court to hold otherwise. (Citing cases.) * * *
>
> It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation * * * (537).
>
> An ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes, *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 320; *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 256, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, it usually distinguishes private from quasi-private occupations.
>
> In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service

and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.

In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been, has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are country wide, a short supply is not likely, and the danger from local monopolistic control less than ever." (538)

The late Chief Justice White, in his dissenting opinion, in the *Northern Securities case, supra*, stated that the issue there involved was whether Congress has the power to regulate and control the acquisition and ownership of stock in two competing railroad companies. Answering such issue, he demonstrated most forcibly and clearly, the proposition that the ownership of property is not embraced within the constitutional power of Congress to regulate commerce, saying:

"I shall not stop to review a multitude of decisions of this court concerning interstate commerce, which, whilst upholding the paramount authority of Congress over that subject, at the same time treated it as elementary, that the effect of the power over commerce beween the States was not to deprive the States of their right to legislate concerning the ownership of property of every character, or to create

> railroad corporations and to endow them with such powers as were deemed appropriate, or to deprive the individual of his freedom to acquire, own, and enjoy property by descent, contract, or otherwise, because railroads or other property might become the subject of interstate commerce."

The majority of the court do not differ from the late Chief Justice White on this point, but were of the opinion that the mere acquisition and ownership of stock was not the substantial issue involved, as is shown by Justice Harlan's statement:

> "It is said that whatever may be the power of a State over such subjects, Congress cannot forbid single individuals from disposing of their stock in a State corporation, even if such corporation be engaged in interstate and international commerce; that the holding or purchase by another corporation, for whatever purpose are matters in respect of which Congress has no authority under the Constitution; that, so far as the power of Congress is concerned, citizens or State corporations may dispose of their property and invest their money in any way they choose; and that in regard to all such matters citizens and State corporations are subject, if to any authority, only to the lawful authority of the State in which such citizens reside or under whose laws such corporations are organized. It is unnecessary in this case to consider such abstract, general questions. The Court need not now concern itself with them. They are not here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination. • • • We do not understand that the Government makes any such contentions or takes any such positions as those statements imply. *It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a State corporation engaged in interstate commerce.*" (Italics ours.)

It may be well to note incidentally, that the above quotation was cited by Senator Borah in the debates upon

the Clayton Act, as showing the extent of congressional power over the acquisition and ownership of stock in private corporations. See Congressional Record, September 30, 1914, p. 15953.

To construe the Clayton Act as a Federal attempt to reach and regulate mere stock ownership save in the event where such stock ownership is directly and substantially affecting interstate commerce, would render the Act unconstitutional, because, in the language of Chief Justice White in the *Standard Oil case* (221 U. S. 1, 68), "to do so would extend the power of Congress to subjects *dehors* the reach of its authority to regulate commerce."

In *Adair v. United States*, 208 U. S. 161, 178, the court speaking through Mr. Justice Harlan, said:

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated."

To support the decree in the *Northern Securities case*, the Government recognized that it was essential to show that the transactions there under attack directly and substantially affected interstate commerce. In the brief of Mr. Attorney General Knox as summarized at pp. 297-317 of 193 U. S., the following statements are made concerning the scope of the control of interstate commerce given to Congress by the Constitution:

> "Of course, it makes no difference whether the obstruction be physical or economic—whether it be a sand bar, a mob or a monopoly—whether it result from the sinking of a vessel, or the stifling of competition—the power of Congress to remove it is the same in each case." (306)
>
> "The combination and monopoly charged by the United States operate directly on interstate com-

merce and do not affect it only indirectly, incidentally or remotely." (315)

It is respectfully submitted that only by giving to Section 7 the interpretation for which we contend can this section be saved from constitutional infirmity. Under our interpretation Congress legislates in pursuance of its constitutional power to prevent and remove a specific *trade practice* which had been found to directly and injuriously affect commerce by means of "the operation of bogus independent companies." From *Gibbons* v. *Ogden*, 9 Wheat. 1 (197), forward, there has never been departure from the rule that the power of Congress over interstate commerce has been construed to extend to and to be limited to (a) the regulation of such commerce itself; and (b), the regulation of the instrumentalities by which such commerce is conducted.

Mere stock ownership is not and cannot be commerce, nor an instrumentality of commerce. Therefore, as a condition precedent to any Federal legislation touching stock ownership, there must exist a situation where such ownership is a direct obstruction in the channels of commerce. Stock ownership had been the means sometimes utilized to interpose such a direct obstruction in the channel of free, normal and competitive trade—*i. e.*, by "the operation of bogus independent companies" (*Standard Oil Co.* v. *United States*, 221 U. S. 1, 43). And Sections 7 and 11, as we respectfully submit, in plan, specifications and details, are merely and clearly the Congressional machinery designed and limited to the removal, in a specified manner, of a specified intercorporate device which experience had shown to be directly obstructive to the free flow of commerce.

In the *First Employers' Liability Cases*, 207 U. S. 463, wherein the original Federal Employers' Liability Act

was declared unconstitutional because of the mistaken assumption by Congress that the constitutional grant to regulate interstate commerce was plenary to regulate all the affairs of common carriers engaged in interstate commerce, Mr. Justice White said (497):

> "From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates if they engage as common carriers in trade or commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, *the statute is addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which such persons may do*—that is, it regulates the persons because they engage in interstate commerce and *does not alone regulate the business of interstate commerce.*" (Italics ours.)

In *Federal Trade Commission* v. *American Tobacco Co.* 264 U. S. 298, Mr. Justice Holmes said (305):

> "The mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be. *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33, 43."

Under the Fifth Amendment, "Liberty" comprehends substantially all those civil rights, including equality of treatment under the law and security against arbitrary discriminations between citizens similarly situated which are placed beyond the power of State legislation by the Fourteenth Amendment.

These principles are so firmly established that we deem it unnecessary to do more than refer to some of the leading cases.

See:

Slaughter House cases, 16 Wall. 36, 127.
United States v. *Cruikshank*, 92 U. S. 542, 554.
Allgeyer v. *Louisiana*, 165 U. S. 578.
Addyston Pipe & Steel Co. v. *United States*, 175 U. S. 211, 228.
Cotting v. *Kansas City Stockyards*, 183 U. S. 79.
Coppage v. *Kansas*, 236 U. S. 1, 10, 14.
New York Life Ins. Co. v. *Dodge*, 246 U. S. 357, 373, 374.
Adkins v. *Chlidrens' Hopsital*, 261 U. S. 525, 544.

"The capability of being transferred is the quintessence of property." Vol. 22, Encyclopedia Americana, p. 660, Title "Laws of Property."

In *Holden* v. *Hardy*, 169 U. S. 366, it is said (p. 391):

"As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further, and say that, as property can only be legally acquired as between living persons by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid."

It has been heretofore pointed out that when the petition was filed herein on November 24, 1919, it affirmatively appeared that there had been sale and transfer, by deed and bill of sale, of all the assets of both Moultrie Packing Company and of Andalusia Packing Company "including the plants, fixtures, machinery and good will" of both said companies, and that for a period of about two years Swift & Company had operated both

said plants and both said businesses as plants and business of Swift & Company, and was so operating the same at the time of the filing of the complaint. (Rec., 8, 10, 51.)

In its findings as to the facts, the Commission found that at a stockholders' meeting of January 5, 1918, "said Moultrie Packing Company was ordered wound up and liquidated and its assets distributed" (Rec., 102); "that, by a certain deed in writing, and a certain other instrument in writing, both dated March 30, 1918, said Andalusia Packing Company, through its president, T. H. Ingwersen, and its secretary, C. A. Peacock, transferred to respondent, Swift & Company, respectively, the real estate at Andalusia, Alabama, of said Andalusia Packing Company, and the business and physical assets of said Andalusia Packing Company, wherever situated." (Rec., 108.)

In other words, it affirmatively and without contradiction appears that long prior to the filing of the complaint, the *stock* of Moultrie Packing Company and of Andalusia Packing Company—the *res* which must directly and substantially obstruct interstate commerce before the Commission can constitutionally acquire jurisdiction under Sections 7 and 11—had parted with all interest in or control over plant, business, and physical assets, *i. e.*, over each and all the instrumentalities of commerce—so that "the use of such stock by the voting or granting of proxies or otherwise" (Sec. 7) could by no possibility directly and substantially affect interstate commerce in which said Moultrie Packing Company and Andalusia Packing Company were no longer engaged and in which they were without instrumentalities to engage.

The Commission by its order assumed that this ad-

ministrative agency possesses power even broader and more comprehensive than the courts of equity of the United States were willing to assume in carrying into effect the purpose of the Anti-Trust Laws. The position of the Commission as to its power under Section 7 bears startling resemblance to the position which this Court was asked to take in enforcing the Sherman Act.

In *U. S. v. U. S. Steel Corporation*, 251 U. S. 417, it is said at page 452:

> "The Steel Corporation by its formation united under one control competing companies and thus, it is urged, a condition was brought about in violation of the statute, and therefore illegal and became a 'continually operating force, with the possession of power unlawfully obtained.' "

But in disposing of this contention it was held, as stated in paragraph nine of the summary (418):

> "In commanding the courts to 'prevent and restrain violations' of it, the Anti Trust Law has regard to conditions as they may exist when relief is invoked and to the usual powers of a court of equity to adapt its remedies to those conditions."

Hitherto no one has ever claimed for the Federal Trade Commission power comparable with the powers of courts of equity. Mr. Justice Brandeis dissented from the decision of the Supreme Court in *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, which annulled an order of the Commission. In his dissenting opinion Mr. Justice Brandeis said (p. 432):

> "The proceeding is not punitive. The complaint is not made with a view to subjecting the respondents to any form of punishment. It is not remedial. The complaint is not filed with a view to affording compensation for any injury alleged to have resulted from the matter charged, nor with a view to protecting individuals from any such injury in the future. The proceeding is strictly a preventive

measure taken in the interest of the general public. * * *" (434)

"In undertaking to regulate competition through the Trade Commission Congress (besides resorting to administrative as distinguished from judicial machinery) departed in two important respects from the methods and measures theretofore applied in dealing with trusts and restraints of trade:

(1) Instead of attempting to inflict punishment for having done prohibited acts, instead of enjoining the continuance of prohibited combinations and compelling disintegration of those formed in violation of law, the act undertook to preserve competition through supervisory action of the Commission. The potency of accomplished facts had already been demonstrated. The task of the Commission was to protect competitive business from *further* inroads by monopoly. * * * Its action was to be prophylactic. Its purpose in respect to restraints of trade was prevention of diseased business conditions, not cure."

In *Eastman Kodak Company* v. *Federal Trade Commission*, 7 F. (2nd) 994, (certiorari granted 46 Sup. Ct. Rep. 102), the Circuit Court of Appeals of the Second Circuit said at page 996:

"The Commission is not a court; it exercises administrative, not judicial power (*National Harness, etc. Ass'n.* v. *Federal Trade Commission* (C. C. A.) 268 F. 705; *Chamber of Commerce* v. *Federal Commission* (C. C. A.) 280 F. 45), and no statutory grant can be found justifying the order that a citizen sell property acquired in the course of business."

In *Chamber of Commerce* v. *Federal Trade Commission*, 13 F. (2d) 673, the Circuit Court of Appeals for the 8th Circuit said, at page 683:

"The Federal Trade Commission is no part of the judicial system of the United States. It does not exercise judicial powers. It is an administrative body created by statute. It has only such duties

and powers, as are given it, by expression or fair implication therefrom, by statute."

(685):

"As the orders of the Commission are purely remedial and preventative, the effect thereof is entirely in the future. Therefore, the jurisdiction of the Commission should, in this respect, be measured as of the time of the order rather than as of the filing of the complaint or as of the hearing thereon."

Is it conceivable that the validity of the title acquired by Swift & Company through the deeds and bills of sale to it covering the Moultrie and Andalusia plants can in any manner depend upon or be affected by the question whether the Legal Department of Swift & Company or the Legal Department of vendors was the instrumentality availed of to work out the details of the conveyances? Is it conceivable that Section 7 can be construed, and if so construed can be upheld, as meaning that the Federal Trade Commission has power and jurisdiction to deal with and set aside the conveyance of physical assets because of the posture of intercorporate stockholding (legal and/or equitable) at the time of such conveyance, the Commission admittedly having no such jurisdiction in case the identical conveyances covering the identical property had an individual grantor or grantee?

May Congress constitutionally forbid a corporation from openly acquiring, through ownership of all the stock of a corporate competitor, the going business of such competitor, under circumstances wherein the transaction would be inoffensive to the law if either seller or buyer, or both, were individuals—the respective positions in the trade, and the instrumentalities used in commerce of the respective corporate and individual vendors and vendees being precisely the same—*i. e.*, may the law

forbid to corporations, solely because they are corporations, what it permits to individuals in identical circumstances?

In *Kentucky Co.* v. *Paramount Exchange*, 262 U. S. 544, wherein the Supreme Court held unconstitutional a Wisconsin statute which imposed on litigants who were nonresident corporations different burdens than were imposed on nonresident individuals, Mr. Justice Van Devanter said (551):

> "No doubt a corporation of one state seeking relief in the courts of another must conform to the prevailing modes of proceeding in those courts and submit to reasonable rules respecting the payment of costs or giving security therefor and the like (see *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553, 561); but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact and not laid on other suitors in like situations. *Here the statute authorized the imposition, and there was imposed, on the plaintiff a highly burdensome requirement because of its corporate origin,—a requirement which under the statute could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary.* There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files and books to Milwaukee for the purpose of an adversary examination that would not apply equally to an individual resident of Louisville in a like case." (Italics ours.)

In *Southern Bell Telephone & Telegraph Co.* v. *Town of Calhoun*, 287 Fed. 381, District Judge Watkins said (387):

> "It is especially held that power to enact special legislation cannot be based upon the mere fact that the thing affected is a corporation, even when the Legislature has power to alter, amend, or repeal the charter thereof. This power does not extend to the taking of the property of the corporation by

confiscation, or indirectly by other means, nor to the right to deny such corporation the equal protection of the laws. *Lake Shore, etc. Railway Company* v. *Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858."

In *Society of Sisters of the Holy Names* v. *Pierce*, 296 Fed. 928, three Federal judges, in declaring unconstitutional the Oregon statute which required children of certain ages to attend public schools, said (931):

> "Without refining as to the precise political rights that corporations, whether civil, religious, or educational, have and possess, and of right may assert and maintain, in this country, it is sufficient to say that it has been recognized by ample authority that, while not possessing the rights of citizens under the privileges, and immunities clause of the Fourteenth Amendment to the Constitution (*Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 45, 20 Sup. Ct. 518, 44 L. Ed. 657), they do have the guaranty, along with citizens, that they shall not be deprived of their property without due process of law nor be denied the equal protection of the laws (*Smyth* v. *Ames*, 169 U. S. 466, 526, 18 Sup. Ct. 418, 42 L. Ed. 819); *Covington etc. Turnpike Co.* v. *Sanford*, 164 U. S. 578, 592, 17 Sup. Ct. 198, 41 L. Ed. 560; *Gulf, Colorado & Santa Fe Railway Co.* v. *Ellis*, 165 U. S. 150, 154, 17 Sup. Ct. 255, 41 L. Ed. 666; *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 416, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247."

When this case reached this Court (268 U. S. 510) the decrees below were affirmed and it was said (535):

> "Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. *Northwestern Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 255; *Western Turf Associaiton* v. *Greenberg*, 204 U. S. 359, 363. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened

by such action. *Truax* v. *Raich*, 239 U. S. 33; *Truax* v. *Corrigan*, 257 U. S. 312; *Terrace* v. *Thompson*, 263 U. S. 197."

In *Truax* v. *Corrigan*, 257 U. S. 312, Mr. Chief Justice Taft said (337, 338):

"Classification must be reasonable. As was said in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 155, classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed, and can never be made arbitrarily and without such basis.' As was said in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293; 'The rule (*i. e.*, of the equality clause) is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations.' The same principle is repeated and enforced in *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417: 'While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based on some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis.' Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand. Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental

rights of the individual. We said through Mr. Justice Brewer, in *Muller* v. *Oregon*, 208 U. S. 412, that 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.' "

In *Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79, Mr. Justice Brewer said (111-112):

"It would practicaly defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope or subject all to the same burdens. It would strip the Legislature of its inherent power to determine generally what is for the general interests, which interests may often be promoted by certain regulations affecting one class which do not affect another—certain burdens imposed on one which do not rest upon another.

But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the law is guaranteed, and that *such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other.* * * * *This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business*, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would." (Italics ours.)

In *A. T. & S. F. Co.* v. *Vosburg*, 238 U. S. 56, Mr. Justice Pitney said (59):

> "The constitutional guaranty entitled all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation."

III.

THE CLAIM BY AND FOR THE FEDERAL TRADE COMMISSION THAT SUCH COMMISSION HAS IMPLIED JUDICIAL POWER IS WITHOUT FOUNDATION.

So long as we keep in mind the fundamentals guaranteed by the Constitution,

(A) *That an administrative agency of Congress cannot be given judicial power;*

(B) *That discriminations between corporations and individuals, in Federal Legislation based upon the Commerce Clause, must be founded on some real difference in the manner by which corporations and individuals affect interstate commerce; and*

(C) *That Federal power to legislate under the Commerce Clause exists only if and when legislation reaches matters, subjects, and things which directly—not incidentally and collaterally—affect and thus regulate interstate commerce,*

We have no difficulty in so interpreting sections 7 and 11 of the Clayton Act as to preserve them from constitutional objection. And these sections can be thus preserved only by rejecting the Commission's conception of its power, as evidenced by the order herein, because such conception is obliv-ious of constitutional guarantees.

When the Clayton Act was passed, Congress had no illusions that an administrative agency of Congress

could constitutionally be given power to interject itself into the commercial world in any circumstances except when interstate commerce was "diretly and substantially and not merely indirectly, remotely, incidentally and collaterally" affected. The limitation upon the power of Congress under the Commerce Clause had been theretofore thus defined in the *Addyston Pipe Case*, 175 U. S. 229, in clear and unmistakable terms, as shown by the following excerpts from said opinion (228):

> "Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. • • •
>
> (229) The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the states. • • •
>
> "(234) Where the contract affects interstate commerce only incidentally and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress. • • •
>
> "(246) It is almost needless to add that we do not hold that every private enterprise which may be

carried on chiefly or in part by means of interstate shipments is theretofore to be regarded as so related to interstate commerce as to come within the regulating power of Congress."

As heretofore pointed out, the draftsmen of the Clayton Act found in the decision of the Supreme Court in the *Addyston Pipe Case* "the origin of the application of the words 'substantially.' "

In *Rigney* v. *City of Chicago*, 102 Ill. 64, Mr. Justice Mulkey said (77):

"Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the Constitution."

In his dissenting opinion in the *Pipe Line Cases*, 234 U. S. 548, Mr. Justice McKenna said (571):

"The conception of property is exclusiveness, the rights of exclusive possession, enjoyment and disposition. Take away these rights and you take all that there is of property."

In *Moore* v. *New York Cotton Exchange*, 296 Fed. 61, wherein the plaintiff sought relief in equity under the Sherman Act and Section 16 of the Clayton Act, the Circuit Court of Appeals of the Second Circuit, speaking through Circuit Judge Rogers, said (66):

"And the right to acquire property is as much entitled to protection as the right to protect property already acquired. *International News Service* v. *Associated Press*, 248 U. S. 215, 236."

He further stated (68):

"As construed by the Supreme Court in the cases cited and in those about to be cited, the Sherman Act is not construed as forbidding or restraining the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish

such purpose. And see *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124; *United States* v. *Reading Co.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243; *Nash* v. *United States*, 229 U. S. 373, 33 Sup. Ct. 790, 57 L. Ed. 1232; *Eastern States Lumber Association* v. *United States*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788.

The cases disclose that where the facts clearly show that the purpose of a contract is not to regulate, obstruct, or restrain interstate commerce, but that the object is properly and fairly to regulate the transaction of the business in which the parties to it are engaged, the agreement will be upheld as not within the statute. The contract is good if 'it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object.' *Anderson* v. *United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300."

The decree entered in the case last cited was affirmed by this Court on April 12, 1926, as reported in 46 Sup. Court Reporter 367. This Court said (369):

"The effect of the making and execution of the contract upon interstate trade or commerce, if any, is indirect and incidental. Neither in purpose nor effect does it directly or unreasonably restrain such commerce or operate to create a monopoly."

The first important case under the Federal Anti-Trust Act was *In re Greene*, 52 Fed. 104. In that case Circuit Judge Jackson, afterward Mr. Justice Jackson, said (115):

"It is very certain that *Congress could not*, and did not, by this enactment, attempt to prescribe limitations to the acquisition, either by the private citizen or state corporation, of property which might become the subject of interstate commerce." (Italics ours.)

In *Hopkins* v. *United States*, 171 U. S. 578, 592, 594, Mr. Justice Peckham said:

> "There must be some direct and immediate effect upon interstate commerce in order to come within the act. * * * An agreement may in a variety of ways affect interstate commerce just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct."

In *United States* v. *Joint Traffic Association*, 171 U. S. 505, Mr. Justice Peckham says (567):

> "Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.
>
> We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business. The instances cited by counsel have in our judgment little or no bearing upon the question under consideration. In *Hopkins* v. *United States*, decided at this term, post 578, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would

enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."

In *Cincinnati Packet Co.* v. *Bay,* 200 U. S. 179, Mr. Justice Holmes says, at pages 184, 185:

"By these words the covenant not to do business between Cincinnati and Portsmouth for five years is imported into the sale of the ships, and made one of the conventional inducements of the purchase. The price is paid not for the vessels alone but for the vessels with the covenant. So, still more clearly, the parallel installments for five years are paid for the covenant, at least in part. It is said that there is no sale of good will. But the covenant makes the sale. Presumably all that there was to sell, beside certain instruments of competition, was the competition itself, and the purchasers did not want the vendors' names.

This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the Act of July 2, 1890, there has been no intimation from any one, we believe, that such a contract made as part of the sale of a business and not as a device to control commerce, would fall within the act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute, *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 329, *United States* v. *Joint Traffic Association,* 171 U. S. 505, 568, and it was so decided in the case of a patent. *Bement* v. *National Harrow Co.,* 186 U. S. 70, 92."

In *Adair* v. *United States,* 208 U. S. 161, Mr. Justice Harlan said (178):

"Manifestly, any rule prescribed for the conduct

of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated."

In *United Leather W. I. U.* v. *Herkert & Meisel Trunk Co.*, 284 Fed. 446, the Circuit Court of Appeals of the 8th Circuit, speaking through Judge Sanborn, said (464):

> "This necessity for having always in mind constitutional limitations in applying such rules of logic and law has been repeatedly recognized and laid down by the Supreme Court. The applied rule is that state laws or *individual acts which affect interstate commerce incidentally* are to be distinguished from those which affect it directly. The former *are without*, the latter are within, *national control. United Mine Workers* v. *Coronado Coal Co., supra; U. S.* v. *Patten*, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.), 325; *Ware & Leland* v. *Mobile County*, 209 U. S. 405, 28 Sup. Ct. 526, 52 L. Ed. 855, 14 Ann. Cas. 1031; *Hooper* v. *California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; *Leloup* v. *Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311; and many other cases." (Italics ours.)

The case last cited involved an alleged interference with interstate commerce in leather goods and trunks by reason of a strike to enforce demands that certain shops be unionized. When the case reached this Court (*United Leather Workers* v. *Herkert*, 265 U. S. 457) in the opinon by Mr. Chief Justice Taft it was said (471):

> "This review of the cases makes it clear that the mere reduction in the supply of an article to be shipped in interstate commerce, by the illegal or tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize the supply, control

its price or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce."

In *Child Labor Tax Case*, 259 U. S. 20, the court, speaking through Mr. Chief Justice Taft, said (39):

> "The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax, and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a state in order to coerce them into compliance with Congress's regulation of state concerns, the court said this was not in fact regulation of interstate commerce, but rather that of state concerns and was invalid. So here the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution."

In *National League* v. *Federal Baseball League*, 269 Fed. 681, the Circuit Court of Appeals of the District of Columbia, said (686):

> "The statute does not apply 'where the trade or commerce affected is interstate unless the effect thereon is direct, not merely indirect.' *United States* v. *Patten*, 226 U. S. 525, 542, 33 Sup. Ct. 141, 145 (57 L. Ed. 333, 44 L. R. A. (N. S.), 325). If the necessary effect is but incidentally or indirectly to restrict the commerce, 'while its chief result is to foster the trade and increase the business of those who make and operate it, it is not violative of this law.'" (Citing many cases.)

This decision was affirmed by this Court in 259 U. S. 200. Mr. Justice Holmes said (208) that "the decision of the Court of Appeals went to the root of the case and if correct makes it unnecessary to consider other seri-

ous difficulties in the way of the plaintiff's recovery," and that (209) the matters "charged against the defendants were not an interference with commerce among the states."

In *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, Mr. Chief Justice Taft said concerning the power to regulate commerce which the Constitution grants to Congress, (478):

> "To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety. *The Daniel Ball*, 10 Wall, 557, 564, 19 L. Ed. 999; *County of Mobile* v. *Kimbell*, 102 U. S. 691, 696, 697, 26 L. Ed. 238; *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 39, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Wilson* v. *Shaw*, 204 U. S. 24, 33, 27 Sup. Ct. 233, 51 L. Ed. 351; *Second Employers' Liability Cases*, 223 U. S. 1, 47, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.), 44; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 529, 14. Sup. Ct. 891, 38 L. Ed. 808."

It is respectfully submitted that the Clayton Act must be construed as intending thus "to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety."

As thus construed the purpose of the Clayton Act was to arrest, by specific directions to an administrative agency, certain practices theretofore found, in certain circumstances, to have been efficient in obstructing the channel of interstate commerce. Accordingly Congress specified in the Clayton Act most of the practices enumerated by Chief Justice White in the *Standard Oil case*, 221 U. S. 1 (41-43) as means or devices by which the defendant in that case had sought to restrain trade and

attain monopoly. In such enumeration the Chief Justice sets forth the holding company (p. 41) and "the operation of bogus independent companies" (p. 43); and our contention is that Section 7 legislated specifically against the "holding company" and the "bogus independent" and Section 11 set up as the single, exclusive writ of execution against this practice an order that a corporation which restrained interstate commerce through stock ownership "divest itself of the stock held."

It is further respectfully submitted that Sections 7 and 11 (although applicable only to corporations) are not arbitrarily and therefore unconstitutionally discriminatory if they be interpreted as dealing *in rem* with the specific evil of *intercorporate stockholding* and as providing the specific remedy of divestiture of stock. This for the reason that "Holding Companies" had been found (*Standard Oil case*, 221 U. S. 1, at pages 41-43) to be one of the means or devices resorted to in efforts to attain monopoly or restrain trade and it was within the power of Congress to prescribe a form of regulatory order against this *purely intercorporate* practice. However, said sections would be wholly arbitrary and therefore unconstitutional if they be interpreted to mean that the owner of plant A (if such owner be an individual) may buy and operate the physical properties and assets of plant B, but that the owner of the same plant A (if such owner be a corporation) may not buy or operate the identical physical properties and assets of the same plant B.

It is further respectfully submitted that the question of the right "to hold, own, control and/or operate properties, physical assets and businesses"—whether illegally obstructive of the channel of interstate commerce—

is a question which Congress has committed exclusively to courts of equity under Section 4 of the Sherman Act (26 Stat. 209), which is applicable alike to corporations and individuals by the specific language of Section 8 which says (26 Stat. 210):

> "The word 'person', or 'persons', wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

The question of the legality, under federal anti-trust laws, of ownership (whether corporate or individual) of physical property is to be determined, as we respectfully submit, by "proceedings in equity" to be instituted "under the direction of the Attorney General" and by the entry by a federal court of equity of such "order or prohibition as shall be deemed just in the premises." (See Sec. 4, Sherman Act—26 Stat. 209.) Construction of Section 11 as conferring on the Federal Trade Commission the power of retrospective relief, *i. e.*, the setting aside of deeds and bills of sale, would raise the grave question whether this was not an unconstitutional endowment of an administrative agency of Congress with judicial power.

To all amendments by Congress under the Commerce Clause the Courts have always attributed to Congress an intent "to regulate in the sense intended" (*Dayton-Goose Creek Ry. Co.*, v. *U. S.*, 263 U. S. 456) that is "an intent to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned as well as the public at large, and to protect its growth and insure its safety."

This Court said in *Standard Oil Company* v. *United States*, 221 U. S. 78, and reiterated in *United States* v.

St. Louis Terminal Railroad Company, 224 U. S. 409, that "the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of trade and commerce, is the foundation upon which the prohibitions of the statute rest, and moreover, that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property."

And "The Clayton Act, as its title and the history of its enactment discloses, was intended to supplement the purpose and effect of other anti-trust legislation, principally the Sherman Act of 1890." (*Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U. S. 346, 355.)

Under the evidence in this case, it is clear that if the order of the Commission is sustained by this Honorable Court, none of the following named can be considered a beneficiary:

(a) The citizens of Moultrie and Andalusia and adjacent communities will not be benefited; they are satisfied with the existing status and have said so.

(b) The farmers and live stock raisers are satisfied and have said so.

(c) The retail dealers are satisfied and say that the product put out by these plants is now more desirable from a "market man's standpoint" than was the product of the old companies.

(d) The public has every opportunity to purchase its meat in a market regulated only by the laws of supply and demand, functioning through full and free competition, each dealer striving to give the maximum of quality and service.

In the situation thus disclosed by the evidence herein there is pertinently applicable the statement of Mr. Justice McKenna in the *Steel case* (*U. S.* v. *U. S. Steel Corporation,* 251 U. S. 417, 451).

In this case the court said (page 451):

> "The corporation was formed in 1901; no act of aggression upon its competitors is charged against it; it confederated with them at times in offense against the law, but abandoned that before this suit was brought, and since 1911 no act in violation of law can be established against it except its existence be such an act. This is urged, as we have seen, and that the interest of the public is involved, and that such interest is paramount to corporation or competitors. Granted,—though it is difficult to see how there can be restraint of trade when there is no restraint of competitors in the trade nor complaints by customers,—how can it be worked out of the situation and through what proposition of law?"

On page 457 the court said:

> "In conclusion, we are unable to see that the public interests will be served by yielding to the contention of the Government respecting the dissolution of the company or the separation from it of some of its subsidiaries; and we do see in a contrary conclusion a risk of injury to the public interest, including a material disturbance of, and, it may be, serious detriment to, the foreign trade. And in submission to the policy of the law and its fortifying prohibitions the public interest is of paramount regard."

Likewise applicable is the statement of Judge Lacombe, speaking for four Circuit Judges in disposing of proceedings brought under the Sherman Act, reported as *United States* v. *Prince Line et al*, and *United States* v. *American-Asiatic S. S. Co. et al.*, 220 Fed. 230, 235:

> "No ship owner, no shipper or consignee, no manufacturer, merchant, or trader, large or small, in the United States or in the Far East, is here with any complaint. Persons engaged in the trade which, it is alleged, is restrained, sit mute; every one seems to be reasonably well satisfied with existing conditions except the government, which contends that the agreements themselves carried out according to their terms constitute a violation of the act, *i. e.*, (as it is now construed), that they evidence an 'un-

> reasonable restraint of trade.' * * * When from carriers and former carriers and prospective carriers of merchandise between the specified ports, and from persons interested in the manufacture, transportation, sale, and purchase of such merchandise, there comes no complaint, it seems a fair inference that whatever restraints may have resulted from defendant's combination and conduct are merely the usual, normal, and reasonable restraints against which it has been held the Sherman Act is not directed."

In *Mennen Co.* v. *Federal Trade Commission*, 288 Fed. 774, (certiorari denied 262 U. S. 759), it was said (781):

> "In *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307, 312, 169 C. C. A. 323, 328 (6 A. L. R. 358), the Circuit Court of Appeals in the Seventh Circuit declared in speaking of the Federal Trade Commission Act of September 26, 1914, 38 St. 717, c. 311:
>
> 'We find in the statute no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it at any price that is acceptable to him or from giving it away."

Conclusion

It is respectfully submitted that the order of the Circuit Court of Appeals should be reversed; and inasmuch as "from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay" (*Fed. Trade Commission* v. *Curtis Pub. Co.*, 260 U. S. 580), such reversal should carry with it directions to set aside the order of the Federal Trade Commission.

All of which is respectfully submitted.

Albert H. and Henry Veeder,
James M. Sheean,
Frank L. Horton.
Counsel for Petitioner.

Office Supreme Court, U. S.
FILED
OCT 25 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1926

No. 231

SWIFT & COMPANY,
Petitioner,
vs.
FEDERAL TRADE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO BRIEF FOR RESPONDENT.

ALBERT H. AND HENRY VEEDER,
JAMES M. SHEEAN,
FRANK L. HORTON,
Counsel for Petitioner.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

PAGE

I. Petitioner has never asserted that any constitional question is presented so long as Sections 7 and 11 are construed to mean precisely and only what they say 1-6

II. Constitutional questions arise only if and when Section 11 be construed to grant the Commission implied authority additional to the authority which is expressly granted by said Section 11 6-9

III. The assertion by the Commission that it possesses by implication or by inference authority which is not expressly granted by Section 11 raises constitutional questions which are not raised by construing the express grant contained in said Section 11 to be sole and exclusive 10-13

IV. Conclusion 13-14

Table of Cases.

Federal Trade Commission v. Sinclair Refining Co. 261 U. S. 463, 475 10

Fertilizing Company v. Hyde Park, 97 U. S. 659, 666 10

Harriman v. Northern Securities Co. 197 U. S. 244, 291 5

Monongahela Bridge Co. v. United States, 216 U. S. 177, 192 11

Northern Securities Company v. United States, 193 U. S. 197 5

Sinking Fund Cases, 99 U. S. 700, 761 13

United States v. Delaware & Hudson Company, 213 U. S. 366 14

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1926

No. 231

SWIFT & COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO BRIEF FOR RESPONDENT.

I.

PETITIONER HAS NEVER ASSERTED THAT ANY CONSTITUTIONAL QUESTION IS PRESENTED SO LONG AS SECTIONS 7 AND 11 ARE CONSTRUED TO MEAN PRECISELY AND ONLY WHAT THEY SAY.

The brief for respondent mistakenly assumes that petitioner herein asserts that either Section 7 or Section 11 of the Clayton Act is unconstitutional. Quite upon the contrary we have urged throughout this case that

no constitutional question arises if Sections 7 and 11 are construed to mean precisely and only what they say. We have never contended that Sections 7 and 11 by their language or their purpose (as elucidated by the congressional debates) or by the making and enforcement of the statutory order in the form specified in Section 11 requiring a company which held the stock of a competitor to "divest itself of the stock held" violated any constitutional right of corporations.

Our contention was and is that Sections 7 and 11 (although applicable only to corporations) are not arbitrarily and therefore unconstitutionally discriminatory in case the order entered follows the language of Section 11. This for the reason that intercorporate stockholding in such position that the effect thereof "may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition" had been found (*Standard Oil Company* v. *U. S.* 221 U. S. 1, at pages 41-43) to be one of the "unfair methods of competition" resorted to in efforts to attain monopoly or restrain trade; that this specific *trade practice*, as well as price discriminations covered by Section 2, exclusive and tying contracts covered by Section 3, and interlocking directorates covered by Section 8 were dealt with by the act and that the intention of Congress thus to deal with specific trade practices was clearly stated in the language of the Committee on Judiciary submitting the bill to Congress (Report No. 698, 63rd Congress, Second Session, July 22, 1914) as follows:

> "Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890, or other existing antitrust acts."

Our contention was and is that Congress provided by Section 11 as the single, exclusive writ of execution against the practice prohibited by Section 7 (purely intercorporate) a prescribed form of regulatory or corrective order, viz., that the corporation found to be restraining the free play of the competitive activities of its purported or ostensible competitor through stock ownership "divest itself of the stock held."

Our contention was and is that it was within the scope of congressional authority to declare that intercorporate stockholding between or among corporations purportedly or ostensibly functioning as competitors in interstate commerce was a direct obstruction in the channel of interstate commerce; and that it was likewise within the scope of congressional authority to delegate to an administrative agency of Congress the power and authority to abate or remove from the channel of commerce the specific trade practice thus declared to be a direct obstruction in the channel of free, normal and competitive trade.

In briefs on behalf of the Government in various suits under the Sherman Act are found the terms "local price discriminations," "tying contracts," "fake competitors" and "bogus independents" as captions under which have been developed the argument that these practices while not in and of themselves violative of the Sherman Act were badges or indicia of monopolistic effort to exclude unfairly from the competitive field. Our contention was and is that the Clayton Act dealt with these specific practices and gave to the Federal Trade Commission the power (and only the power) to remove or abate these specific practices. Whether the words "holding company," "bogus independent" or "fake competitor" comprehensively and accurately describe the evil dealt with by Section 7 does not seem to us important.

Ostensibly functioning as though they were competitors by corporations whose activities are *in fact* dominated and controlled by intercorporate stockholding (Section 7) or by interlocking directorates (Section 8) may, we have always contended, be declared by Congress to be *a thing* unduly and directly obstructive to the free channel of interstate trade and therefore *a thing* which Congress may authorize its administrative agency to remove from such channel. But likewise we have always contended that the question of the right "to hold, own, control and/or operate properties, physical assets and businesses"—whether illegally obstructive of the channel of interstate commerce—is a question which Congress has committed exclusively to courts of equity under Section 4 of the Sherman Act (26 Stat. 209) which is applicable alike to corporations and individuals by the specific language of Section 8 which says (26 Stat. 210):

> "The word 'person' or 'persons,' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country."

The complaint against Swift & Company called upon respondent to show cause why an order should not be entered "requiring it to divest itself of stock or share capital." (Rec., 65.) The order actually entered, instead of following the language of the statute or of the complaint, denies Swift & Company the right to own, control or operate "properties, physical assets and businesses" which had been conveyed to Swift & Company by deeds and bills of sale a year or two before the proceedings were initiated in 1919 and four or five years before the order was entered in 1922. The question of

the legality, under federal law, of ownership (whether corporate or individual) of physical property is to be determined, as we respectfully submit, by "proceedings in equity" to be instituted "under the direction of the Attorney General" and by the entry by a Federal Court of Equity of "such order or prohibition as shall be deemed just in the premises." (Sec. 4 Sherman Act—26 Stat. 209.)

We respectfully submit that the Brief for Respondent misconceives the scope and effect of the decision of this court in the *Northern Securities case* (193 U. S. 197). As we read that case this court accepted the position taken in the brief of Attorney General Knox that if and when stock ownership and power exercised through such ownership "operate directly on interstate commerce, and do not affect it only indirectly, incidentally and remotely" (315) so that such ownership and power are found to be obstructing interstate commerce, then "of course, it makes no difference whether the obstruction be physical or economic,—whether it be a sand-bar, a mob or a monopoly—whether it result from the sinking of a vessel, or the stifling of competition—the power of Congress to remove it is the same in each case." (306) That such is the correct interpretation of the decision in the *Northern Securities case* seems clear from what is said by this court in *Harriman* v. *Northern Securities Company*, 197 U. S. 244, wherein claim was made that the judgment or opinion in the *Northern Securities case* (193 U. S. 197) had made adjudication concerning the disposition of the stock acquired by the Northern Securities Company. This court said at page 291:

> "In speaking of the situation as between the Government and the defendants, the Securities Company is sometimes referred to as the custodian of the shares and sometimes as the absolute owner, but

in the sense that in either view the combination was illegal. For the purpose of that suit it was enough that in any capacity the Securities Company had the power to vote the railway shares and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or of trustee, would tend to prevent competition, and thus restrain commerce.

Some of our number thought that as the Securities Company owned the stock the relief sought could not be granted, but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of title was."

At page 299:

"Doubtless it became the duty of the Securities Company to end a situation that had been adjudged unlawful, and this could be effected by sale and distribution in cash, or by distribution in kind, and the latter method was adopted, and wisely adopted, as we think, for the forced sale of several hundred millions of stock would have manifestly involved disastrous results."

II.

CONSTITUTIONAL QUESTIONS ARISE ONLY IF AND WHEN SECTION 11 BE CONSTRUED TO GRANT THE COMMISSION IMPLIED AUTHORITY ADDITIONAL TO THE AUTHORITY WHICH IS EXPRESSLY GRANTED BY SAID SECTION 11.

We fail to find in the brief for respondent any reference to the very specific language of Section 11 of the Clayton Act, or to the argument of petitioner that said Section 11 provides the specific and exclusive form of order—the precise and only writ of execution—which Congress authorized its administrative agency to issue when hearing discloses the evil trade practice of intercorporate stockholding which is prohibited by Section 7.

Said Section 11 of the Clayton Act is as follows (italics ours):

> "That authority to enforce compliance with sections 2, 3, 7 and 8 of this act by the persons respectively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:
>
> Whenever the Commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of Sections 2, 3, 7 and 8 of this act it shall issue and serve upon such person a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. * * * If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, *and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this act, if any there be, in the manner and within the time fixed by said order.*"

As pointed out Section 7 deals with intercorporate stockholding and Section 8 with interlocking directorates —such interlocking directorates being forbidden to certain banks and also to all corporations engaged in whole or in part in interstate commerce if one of such corporations has capital, surplus and undivided profits aggregating more than $1,000,000 and if such corporations are or shall have been theretofore, by virtue of their

business and location of operation, competitors so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws.

It is respectfully submitted that if Section 11 confers power upon the Federal Trade Commission to enter the order hereinbelow set forth in the left column as an appropriate corrective order to remove the evil of "intercorporate stockholding," then there must be like implied power in the Commission and in the Federal Reserve Board to enter like corrective order such as is set forth in the right column to remove the evil of "interlocking directorates."

TO CORRECT INTERCORPORATE STOCKHOLDING.

NOW, THEREFORE, IT IS ORDERED: That respondent, Swift & Company, within six calendar months from and after the date of the service of a copy of this order upon it, shall:

(1) Cease and desist from further violating Section 7 of the Clayton Act by continuing to own or hold, either directly or indirectly, by itself or by any one for its use and benefit, any of the capital stock of the Moultrie Packing Company and of the Andalusia Packing Company, or either of them, and Cease and Desist from holding, controlling and/or operating, or causing to be held, controlled and/or operated by others for its use and benefit, the former property and business either of the said Moultrie Packing Company or of the said Andalusia Packing Company, which have been held, controlled and operated by respondent and its employees and agents following and as a result of respondent's unlawful acquisition of the capital stocks of said named corporations; and to that end, respondent shall

(2) So divest itself of all the capital stocks heretofore acquired by respondent, including all the fruits of such acquisitions, in whatever form they now are, whether held by respondent or by anyone for its use and benefit, of the Moultrie Packing Company, a corporation, and of the Andalusia Packing Company, a corporation, or either of them, in such manner that there shall not remain to respondent, either directly or indirectly, any of the fruits of said acquisitions, including the control and/or operations of said corporations, or either of them, resulting from such acquisition and/or holdings of such capital stocks.

TO CORRECT INTERLOCKING DIRECTORATES.

NOW, THEREFORE, IT IS ORDERED: That respondent, within six calendar months from and after the date of the service of a copy of this order upon it shall:

(1) Cease and desist from further violating Section 8 of the Clayton Act by continuing to have as a director any of the following named persons: ....., ..., ... and cease and desist from holding, controlling and/or operating or causing to be held, controlled and/or operated by others for its use and benefit, the former property and business of the said ..... Company which have been held, controlled and operated by respondent and its employees and agents, following and as a result of respondent's unlawfully having directors who were at the same time directors of the said ..... corporation; and to that end respondent shall:

(2) So rid itself of the said directors chosen contrary to the provisions of Section 8 in such manner that there shall not remain to respondent either directly or indirectly, any of the fruits of said interlocking directorates, including the control and/or operations of said ..... corporations, or either of them, resulting from said respondent having directors who were at the same time directors of said other corporations.

III.

THE ASSERTION BY THE COMMISSION THAT IT POSSESSES BY IMPLICATION OR BY INFERENCE AUTHORITY WHICH IS NOT EXPRESSLY GRANTED BY SECTION 11 RAISES CONSTITUTIONAL QUESTIONS WHICH ARE NOT RAISED BY CONSTRUING THE EXPRESS GRANT CONTAINED IN SAID SECTION 11 TO BE SOLE AND EXCLUSIVE.

We are in complete accord with the proposition stated and urged in the brief for respondent that "there is in the statute no unconstitutional delegation of judicial powers."

The power which the statute gives is plainly stated as being authority to enter an order to "cease and desist from such violations and divest itself of the stock held." (Sec. 11.) As stated by Mr. Justice McReynolds in *Federal Trade Commission* v. *Sinclair Refining Company*, 261 U. S. 463, 475:

> "The powers of the Commission are limited by the statutes."

When the Commission asserts that although neither the Trade Commission Act nor the Clayton Act anywhere gives authority to the Commission even to order a sale of stock, nevertheless the granted power to order a respondent to "cease and desist" inferentially or impliedly includes the power to require the sale of physical property, then it is respectfully submitted that appropriate reply to such asserted claim is found in the language of Mr. Justice Swayne in *Fertilizing Company* v. *Hyde Park*, 97 U. S. 659, 666:

> "Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be

> shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

It is respectfully submitted that Congress did not confuse and intermingle, in the powers given the Federal Trade Commission, the functions which are administrative with functions which are judicial; that there is no more justification for the asserted claim of implied judicial power on the part of the Federal Trade Commission in connection with its administrative duty of preventing obstruction to the channel of interstate commerce through intercorporate stockholding than there would be for asserting implied judicial power on the part of the Secretary of War in preventing obstruction to such channel through bridges of insufficient height or span. The distinction between functions which are administrative and those which are judicial has been clearly drawn by this court.

In *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, it was held that Congress may, in order to enforce its enactments, clothe an executive officer with power to ascertain whether certain specified facts exist and thereupon to act in a prescribed manner, without delegating, in a constitutional sense, legislative or judicial power to such officer.

The court says (192):

> "This court has heretofore held upon full consideration and after an examination of the adjudged cases: 1. That Section 18 of the River and Harbor Act of March 3, 1899, 30 Stat. 1151, could not reasonably be taken as a delegation of legislative and judicial power to an Executive Department of the Government; that the statute did not in any real, constitutional sense delegate to the Secretary of War any power that must, under our system of government, be exclusively exercised either by the legis-

> lative or judicial branch of the Government; that under its paramount power to regulate commerce on and over the navigable waters of the United States Congress could require that such waters be freed from unreasonable obstructions to navigation; that the statute in effect prescribed the general rule, applicable to all navigable waters, that free navigation should not be hampered by unreasonable obstructions arising from bridges of insufficient height, width of span or other defects; that instead of exerting its power by direct legislation in each case of a bridge alleged to constitute an unreasonable obstruction to navigation, Congress charged the Secretary of War with the duty of ascertaining, in each case, upon notice to the parties concerned, whether the particular bridge came within the general rule prescribed."

The order herein retroactively requires the setting aside of deeds and bills of sale which were executed and delivered in 1917 and 1918 and requires that Swift & Company cease and desist from owning and/or operating properties, physical assets and businesses (Rec., 90, 91) now and for many years last past (in the language of the findings made by the Commission) "operated as the plants and businesses of Swift & Company" upon one of which plants (Moultrie) Swift & Company (the holder of record title) up to October 30, 1920, had expended (Com. Ex. 57, Rec., 1324 and Respondent's Ex. 13, Rec., 1557, 1558) almost a million dollars for betterments and improvements (or many times the original purchase price) and upon the other of which plants (Andalusia) Swift & Company's expenditures for betterments and improvements, after taking title thereto, were much more than the original purchase price. (Respondents' Ex. 27, Rec., 1571.)

Such an order, we respectfully submit, ignores the fact that the Federal Trade Commission is purely the admin-

istrative arm or agency of the legislative branch of the Government, and such order attempts to usurp powers which are inherently judicial. In *Sinking Fund Cases*, 99 U. S. 700, Mr. Justice Field said at page 761:

> "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions."

Conclusion.

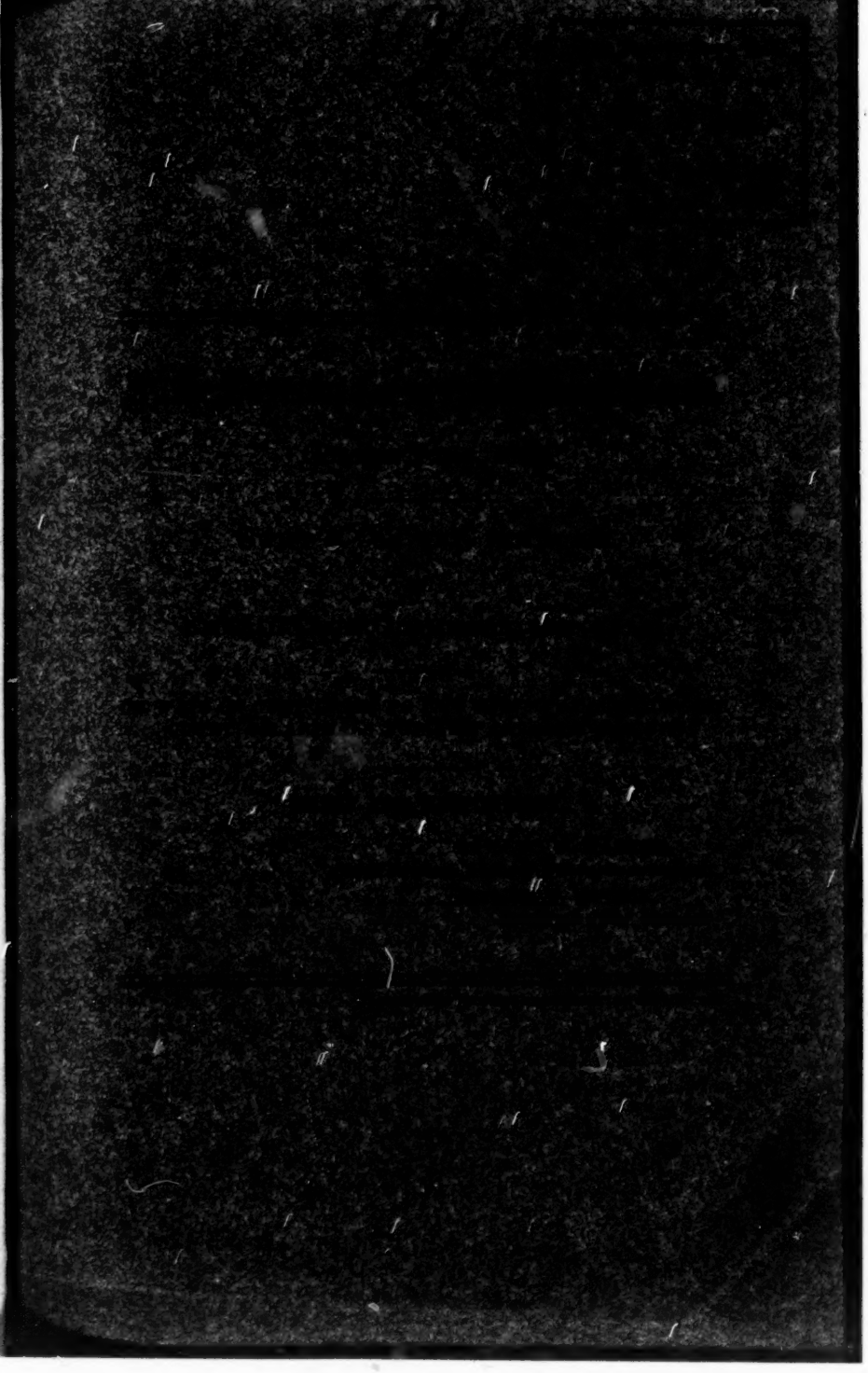
In conclusion we respectfully reiterate the statement in our opening brief that no constitutional question arises in this case if Sections 7 and 11 of the Clayton Act are construed to mean precisely and only what they say. And we respectfully submit that if consideration of any constitutional question is made necessary only if and when the specific language of Sections 7 and 11 be departed from, or enlarged by implication or by inference, then it is wholly immaterial whether the constitutional questions suggested in our brief (pp. 44-61) or the constitutional questions suggested in the Brief for Respondent (pp. 40-48) are the particular and precise constitutional questions thus thrust upon the court by departure from the language of the two sections. Whichever or whatever be the correct constitutional question which can arise only if and when a particular construction be sought, the controlling rule established by this court would be the rule stated in paragraphs 2 and 3 of

the syllabus of the decision in *United States* v. *Delaware & Hudson Co.* 213 U. S. 366, as follows:

> "The duty of this court in construing a statute which is reasonably susceptible of two constructions, one of which would render it unconstitutional and the other valid, to adopt that construction which saves its constitutionality (*Knights Templar Indemnity Co.* v. *Jarman*, 187 U. S. 197) includes the duty of avoiding a construction which raises grave and doubtful constitutional questions if the statute can be reasonably construed so as to avoid such questions. *Harriman* v. *Interstate Com. Comm.* 211 U. S. 407.
>
> This rule applied to the commodities clause of the Hepburn Act so as to avoid deciding the constitutional questions which would arise if the clause were construed so as to prohibit the carrying of commodities owned by corporations of which the carrier is a shareholder, or which it had mined, manufactured or produced at some time prior to the transportation."

All of which is respectfully submitted.

ALBERT H. and HENRY VEEDER,
JAMES M. SHEEAN,
FRANK L. HORTON,
Counsel for Petitioner.



INDEX

	Page
Opinion below	1
Grounds of jurisdiction	1
The facts	2
1. Organization and volume of business of Moultrie and Andalusia companies	3
(*a*) Moultrie company	3
(*b*) Andalusia company	3
2. Interstate commerce involved	4
3. Character of commodities and demand therefor	4
4. Competition between Moultrie and Andalusia and between these companies and Swift & Company	5
(*a*) Territory in which products were sold; selling organization; sales in particular cities	5
(*b*) Business of Swift & Company in same territory	7
(*c*) Price differential; local products, western pork	8
(*d*) Other advantages enjoyed by acquired companies	8
5. Acquired companies practically only substantial distributors fresh pork in extreme southeast at time of acquisition	9
6. Volumes of sales Moultrie and Andalusia pork products in Atlanta, Jacksonville, and Birmingham compares favorably with Swift & Company sales in those markets	10
(*a*) Fresh pork	10
(*b*) Total sales pork products	11
7. Competition in soft pork "hurt" Swift and others	11
8. Elimination of competition between acquired companies and between these companies and Swift	12
Summary of argument	15
Argument	18
I	
The prohibitions of section 7 of the Clayton Act not limited to holding companies which operate subsidiaries as "Bogus independents"	18
II	
The section reaches substantial lessening of competition between two or more corporations by stock ownership and does not operate to prohibit only those undue restraints of trade prohibited by the Sherman law	25

II

III

Page

The section is an exercise by Congress of its powers directly to regulate interstate commerce itself and not of its power to protect interstate commerce from burdens de hors the body of such commerce 29

IV

The act not an undue limitation upon the liberty of corporations to contract 33

V

The act as construed by the commission does not confer jurisdiction over manufacturer or the ownership of property 35

VI

The act does not discriminate between corporations and natural persons in such manner as to deprive corporations of liberty or property without due process of law 37

VII

There is in the statute no unconstitutional delegation of judicial powers 49

Conclusion 50

TABLE OF CASES

Addystone Pipe Co. v. *United States*, 175 U. S. 211 30
Atlantic Coast Line v. *Riverside Mills*, 219 U. S. 186 34
Central Life Ins. Co. v. *Smith*, 236 Fed. 170 44
Central Lumber Co. v. *South Dakota*, 226 U. S. 157, 160, 161 ..... 41, 48
Commercial Fire Ins. Co. v. *Board*, 99 Ala. 1, 11 44
Continental Insurance Co. v. *United States, Reading Co. et al.*, 259 U. S. 156 37
De La Vergne v. *German Savings Institution*, 175 U. S. 40 44
Dunbar v. *Amer. Tel. & Tel. Co.*, 224 Ill. 9 43
Elkins v. *Camden R. R. Co.*, 36 N. J. Eq. 5 44
Erie v. *Williams*, 233 U. S. 685 34
Federal Trade Commission v. *Gratz*, 253 U. S. 421 2
Georgia R. R. Co. v. *Collins*, 40 Ga. 583 44
Hamilton v. *Savannah F. & W. Ry. Co.*, 49 Fed. 412 44
Heath & Milligan Mfg. Co. v. *Worst*, 207 U. S. 338, 354, 355 41
Mallinckrodt v. *St. Louis*, 238 U. S. 41 46
Marble Co. v. *Harvey*, 92 Tenn. 115 44
Memphis & C. R. Co. v. *Wood*, 7 So. Rep. 108 44
Mutual Loan Co. v. *Martell*, 222 U. S. 225, 235 41
Northern Securities Co. v. *U. S.*, 193 U. S. 327 ..... 16, 26, 33, 45
Pearson v. *Concord Ry.*, 62 N. H. 537 44
Prudential Ins. Co. v. *Cheek*, 259 U. S. 530 48

	Page
Robotham v. *Prudential Ins. Co.*, 64 N. J. Eq. 673, 851	42
Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U. S. 346, 356	26, 32
Toyota v. *Hawaii*, 226 U. S. 184, 191	41
United States v. *United Shoe Machinery*, 258 U. S. 451, 459, 460	26, 32
United States v. *United Shoe Machinery Co.*, 264 Fed. 138, 162	26
United States v. *American Tobacco Co.*, 221 U. S. 106	34
United States v. *Ferger*, 250 U. S. 199	30
United States v. *International Harvester Co.*, 214 Fed. 987, 992	24, 36
United States v. *Knight Co.*, 156 U. S. 1	31, 34
United States v. *Reading Co.*, 253 U. S. 26	36
United States v. *Union Pacific R. R. Co.*, 226 U. S. 61	31

STATUTES CITED

Clayton Act (38 Stat. 730)	1
Decrees and Judgments, Federal Antitrust Cases, 165–191	36
Judicial Code, sec. 240	2

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 231

SWIFT & COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court below is found in 8 F. (2d) 595. It also appears at pp. 1603–1610 of the printed transcript.

GROUNDS OF JURISDICTION

This was a petition by Swift & Company to the Circuit Court of Appeals for the 7th Circuit to review and set aside an order of the Federal Trade Commission (R. 90–91) entered under authority of Sections 7 and 11 of "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes" (38 Stat. 730), popularly known as "the Clayton Act"

The jurisdiction of the Court below was invoked under Section 11 of that Act. A decree affirming the order of the Commission was entered on February 16, 1925. (R. 1611.)

Jurisdiction of this Court is invoked under Section 11 of the Clayton Act and under Section 240 of the Judicial Code. (*Federal Trade Commission* v. *Gratz*, 253 U. S. 421.)

THE FACTS

The Court below, in the course of its opinion, states:

> The Commission found—and no other finding could have been made—that the purchaser was engaged in interstate commerce; that while so engaged, he purchased all the stock of the Moultrie Packing Company and the stock of the Andalusia Packing Company, both of which companies were also engaged in interstate commerce; and that the effect of such acquisition was to substantially lessen competition between the corporation whose stock was acquired and the corporation making the acquisition. (R. 1606.)

The following are the salient facts with respect to the extent of the business of the Moultrie and Andalusia companies, both geographically and in volume, the competition between these companies and between them and Swift & Company and the elimination of that competition by the acquisition.

1. Organization and volume of business of Moultrie and Andalusia Companies

(a) *Moultrie Company.*

The Moultrie Packing Company was organized some time in 1913 (Rec. p. 1278), and about December, 1914, actively began the business of slaughtering beef cattle and hogs and selling meat and meat products. Its sales, by years, from 1914 to and including the first five months of 1917, were as follows:

	1914	1915	1916	1917 (5 months)
Pork.....lbs..	200, 598	2, 199, 441	7, 305, 506	3, 907, 909
Beef.....lbs..	24, 739	442, 221	196, 333	252, 280
Lard.....lbs..	20, 320	326, 580	1, 171, 875	827, 575

The paid-up capital stock of the company in June, 1917, was approximately $97,000. (Rec. p. 1270.) In May, 1917, its surplus amounted to $92,170.79 (Rec. p. 1316), and the net profits from January 1, 1917, to April 30, 1917, amounted to $59,997.09 (Rec. p. 1316).

(b) *Andalusia Company.*

The Andalusia Company was organized in October, 1915, by residents of Andalusia, Alabama, and vicinity. (Rec. pp. 362, 1447.) Its paid-up capital stock was $133,250 (Rec. p. 1453) held by from 175 to 200 persons in the city of Andalusia and vicinity (Rec. pp. 360–361). It began operations about June, 1916. (Rec. p. 362.) Its sales were approxi-

nately, for six months of 1916 and five months of 1917, as follows:

	1916 (part of the year)	1917 (five months)
Pork ..... lbs..	3,065,341	2,911,692
Beef ..... lbs..	6,426	189,523
Lard ..... lbs..	383,774	564,293

Its gross profits for the year ending May 1, 1917, were $130,087.23, and its net profits $62,646.80. (Rec. p. 1399, Ex. 112.)

2. Interstate commerce involved

Both the Moultrie and Andalusia companies had important interstate business in direct competition with Swift & Company, and in competition with each other. (R. 469–470; 1541, 244, 222, 227, 419.)

3. Character of commodities and demand therefor

Both the Moultrie and Andalusia Companies slaughtered cattle and hogs raised almost exclusively in Georgia, Alabama, and Florida. Pork was the principal product sold by both. The hogs raised in the territory from which these companies drew their supply were, up to July, 1917, very largely fattened upon peanuts and similar feeds, which results in the meat being softer and more oily than the meat from corn-fed hogs. This makes it more difficult to handle, the shrinkage is greater both on fresh and cured meats, and to this extent it is less desirable to the dealers. (Rec. pp. 655–656, 658.)

The meat, however, is sweet and wholesome and the flavor much liked by many consumers. (Rec. pp. 523, 652, 696, 1054.) Substantial evidence of the demand for this particular commodity is found in the fact that Swift & Company purchased substantial quatities of it from the Andalusia Company prior to securing control of the company (Rec. pp. 949, 950, 1077–1078), and that after the purchase of the stock they sold the products in place of all brands of their western pork except Premium (Rec. p. 921).

4. Competition between Moultrie and Andalusia Companies and between these companies and Swift & Co.

(a) *Territory in which products were sold, selling organization, and sales in particular cities.*

The Moultrie Packing Company, in the year 1916 and until June, 1917, sold its output in 215 cities, towns, and villages in Georgia, 56 cities, towns, and villages in Florida, and 15 cities, towns, and villages in Alabama. Large quantities of products were sold by the company especially in Atlanta, Macon, and Savannah, Georgia; in Jacksonville, Florida (Rec. p. 26), and in Birmingham, Alabama (Rec. pp. 355, 356). In the larger cities the company sold through brokers. The company's broker in Atlanta sold from one to three carloads of products per week (Rec. p. 198); this broker sold to from 150 to 200 of the large buyers of fresh meats in that city (Rec. p. 150). His total sales of meat and meat products from June, 1916, to

May, 1917, amounted to $238,000. (Rec. p. 138.) According to Moultrie Packing Company ledger he sold 1,264,699 pounds of fresh meat during 1916 and the first six months of 1917, and during the same period his sales of smoked meats amounted to $176,948. (Rec. pp. 1543–1546.) The company's broker in Jacksonville, Florida, sold from 30,000 to 60,000 pounds of products per week. (Rec. pp. 469–470.) Moultrie Packing Company ledger shows that during 1916 and first six months of 1917 he sold 856,495 pounds of fresh meat and during the same period his sales of smoked meats, etc., amounted to $55,671.33. (Rec. pp. 1547–1550.)

The Andalusia Packing Company sold meat and meat products in the same general territory covered by the Moultrie Company. It sold in 19 cities and towns in Georgia, 41 cities and towns in Florida, and 115 cities and towns in Alabama. (Rec. p. 419.) Its broker in Atlanta sold meat and meat products to the value of approximately $4,000 to $6,000 per week in that city for a period of approximately nine months. (Rec. pp. 222, 227.) Its broker in Birmingham, Alabama, sold products to the amount of 2 to 3 carloads per week (Rec. p. 288); during a period of about a year this broker's sales amounted to $268,699 (Rec. p. 292); and from January 1, 1917, to September of that year he sold 682,733 pounds of fresh meats (Rec. p. 292). He had fully 25% of the business on fresh pork cuts in the down-town section of Birmingham.

(Rec. p. 319.) This section of Birmingham sold about 30% of the meat sold in the city of Birmingham. This broker had four salesmen, who covered 43 cities and towns which were named and some 15 or 20 smaller places which he was unable to name from memory. This testimony was corroborated by another witness. (Rec. p. 332.)

Besides selling through brokers, the company traveled two or three salesmen in addition to its office salesmen. (Rec. p. 363.)

(b) *Business of Swift & Company in same territory.*

During the period from the entry of the Moultrie and Andalusia companies into the meat-packing business, and until July, 1917, Swift & Company was actively engaged in selling fresh and cured meats and meat products, not only in the same territory but in the same towns and to the same retail dealers who purchased and sold the products of the Moultrie and Andalusia companies. During that period Swift & Company had branch houses in Augusta, Atlanta, Macon, Columbus, and Savannah, Georgia; at Jacksonville, Pensacola, and Tampa, Florida, (Rec. p. 251); and at Birmingham, Gadsden, Anniston, Huntsville, Albany, and Montgomery, Alabama (Rec. p. 343); it traveled salesmen over the entire territory and solicited business in probably every one of the three or four hundred cities and towns in which the Moultrie and Andalusia companies sold their out-

put (Rec. pp. 138, 247, 248, 293, 311, 312, 342–352).

It will thus be seen that the Moultrie Company was, until July, 1917, in competition with the Andalusia Company in important territory; and that both companies were in active, vigorous, and extensive competition with Swift & Company in the sale of fresh and cured meats in the principal cities and towns of Georgia, Florida, and Alabama.

(c) *Price differential between local products and western pork.*

Prior to the acquisition by Swift & Company of the stock of the Moultrie and Andalusia Companies this soft or locally slaughtered pork was usually sold by the companies at from one to four cents per pound less than hard, western pork, the differential being narrower on fresh-pork cuts (Rec. pp. 153, 168, 655, 696, 438, 439, 503–504); though at times an equal price could be had for fresh cuts (Rec. pp. 158, 228, 321). This difference in price could be made for, among others, two reasons: First, the cost of fattening hogs on peanuts and similar feeds is less than the cost of fattening them on corn (Rec. p. 642); and second, the differential between the freight on meat shipped from northern and western packing plants and that on meat shipped by the Moultrie and Andalusia Companies was substantially in favor of the local slaughterers.

(d) *Other advantages enjoyed by the acquired companies.*

A further advantage which the Moultrie and Andalusia companies enjoyed over their distant competitors in the North and West is found in the fact that their fresh pork would not ordinarily have to be frozen before shipment and sale (Rec. p. 168), while western and northern pork must be frozen before shipment. Frozen pork is not so well liked as that which has not been frozen. (Rec. p. 137.) The product also was absolutely fresh, reaching the retailer's table from 24 to 48 hours after slaughter. (Rec. p. 168.) The appeal that the product was locally produced and that its purchase and sale would tend to the general prosperity of the section was also of great assistance in selling the product of the local companies. (Rec. p. 329.)

5. Exclusive of the five large packers, the acquired companies were practically the only substantial distributors of fresh pork in the extreme Southeast at time of acquisition

The Moultrie and Andalusia companies appear to have been the first companies to have sold this locally slaughtered pork to any extent in the territory covered by the evidence in the case. (Rec. pp. 135, 186, 316, 441–445, 633, 1053.) Moreover, prior to the entry into the market of the Moultrie and Andalusia companies, the five great packing companies were, with one relatively unimportant exception, practically the only companies selling fresh pork in that territory in substantial quanti-

ties with any degree of regularity. (Rec. pp. 316, 1050, 1051, 1240–1241.)

6. Volume of sales of Moultrie and Andalusia pork products in Atlanta, Jacksonville, and Birmingham markets compares favorably with Swift & Company sales in those markets

(a) *Fresh pork.*

The principal product sold by the Moultrie and Andalusia companies was fresh pork. During the year 1916 the Moultrie Packing Company sold in the Atlanta market 692,558 pounds of fresh meat. (Rec. 1543 to 1546, Resp. Ex. No. 5.) This fresh meat was practically all pork. (Rec. pp. 138–139.) During a part of that year the Andalusia Packing Company was also shipping pork products into Atlanta, but the exact volume could not be ascertained. Swift & Company during 1916 sold 823,682 pounds of fresh pork in the Atlanta market. (Rec. 251.) During the first six months of 1917 the Moultrie Packing Company sold 571,741 pounds of fresh pork in the Atlanta market. (Rec. 1543–1546.) By this time the Andalusia products were coming steadily into the market at the rate of $4,000 to $6,000 per week. (Supra, p. 6.)

In Jacksonville, Florida, the Moultrie Packing Company during 1916 sold 492,917 pounds of fresh meat through its broker, Sam T. Smith, who (pp. 1547–1550, Resp. Ex. No. 6) testified that the Moultrie products he was selling were pork products (Rec. p. 468). During 1916 Swift & Company

sold 355,063 pounds of fresh pork in the Jacksonville market. (Rec. p. 351.)

In Birmingham, Alabama, Swift & Company sold during 1916, 1,533,644 pounds of fresh pork. (Rec. p. 351.) There is no record of the exact number of pounds of fresh pork sold by the Andalusia Packing Company in that market during that period of time, but during the first six months of 1917 Mr. E. P. Allen, broker, testified from his records that he sold for the Andalusia Packing Company 682,733 pounds of fresh meat. (Rec. p. 292.)

(b) *Total sales pork products.*

The total production of pork products by the Moultrie and Andalusia Companies during the year 1916 amounted to 10,370,847 pounds, and during the first six months of 1917 amounted to 6,822,608, or a total of 17,193,448 pounds from January 1, 1916, to June 30, 1917. (Rec. pp. 1365, 1467.)

During the year 1916 Swift & Company sold in the Birmingham and Atlanta districts, covering practically all the territory in the States of Alabama, Georgia, and Florida, a total of 32,760,131 pounds of pork products, or about three times the total production of the Moultrie and Andalusia Packing Companies during the same year. (Rec. pp. 251, 351.)

7. Competition in soft pork "hurt" Swift & Company and other large packers

The factors above summarized had served to make the Moultrie and Andalusia companies sub-

stantial and troublesome competitors of Swift & Company in Georgia, Alabama, and Florida, by the spring of 1917.

The Atlanta manager for the Cudahy Packing Company in 1917 in this territory testified that the people selling southern pork hurt the business of the Cudahy Packing Company to the extent of Cudahy having to reduce prices on western pork to compete with southern pork or let them take the business, and that he thought the managers of the other large packers, including Swift & Company, had the same experience, as they were working under similar conditions. (Rec. p. 639.)

8. Elimination of competition between the acquired companies and between these companies and Swift & Company

Immediately upon purchasing the share capital of the two companies Swift & Company took over the control of their operations. An employee of Swift & Company was sent to Moultrie to take charge of the office of the company, and another employee "to watch things" and work with the then manager, who was temporarily retained. (Rec. pp. 231, 602, 1270.) On or about July 16, 1917, Swift & Company sent two of its employees to Andalusia to take charge of the business of that company (Rec. pp. 379, 392, 395, 540, 1401), the then manager remaining with the company until about November, 1917, but being under the direction of Swift & Company.

Shortly after the purchase of the stock of the companies by Swift & Company the branch houses of the latter began to sell the products of both companies, though the brokers previously handling the goods were temporarily retained. (Rec. pp. 232, 293, 723, 725, 1346–1347.)

Almost immediately upon the purchase of the stock and the taking charge of the plants by the representatives of Swift & Company competition between the products of the Moultrie and Andalusia companies and those of Swift & Company was lessened by the substantial increase in price of soft-pork products produced by the Moultrie and Andalusia companies, the prices being brought up almost to the level of the prices of hard western pork sold by Swift & Company. (Rec. pp. 153, 161, 162, 173, 421, 475–479, 696, 438–439, 498, 503–505, 510–511, 1346–1347, 1348, 1354–1356, 1358, 1394–1395, 1416–1418, 1420, 1425.)

The intention to increase the prices of soft-pork products manifested itself immediately on the purchase of the stock of the two companies.

On July 25, 1917, T. G. Conner, manager of the Andalusia Company, wrote to J. W. Clark Company, the former's broker at Atlanta, to the effect that the sale of the plant had been consummated, but so far as the general public was concerned there would be no difference in management, and as far as they could without conflicting with branch houses they did not wish to sever en-

tirely their sales connections. "We will probably ask you to continue, to some degree, at least, to handle our products. We only request that you do not sacrifice sales and that you do not break the market." (Rec. pp. 1346–1347.)

Practically all the important brokers who handled the products of the Moultrie and Andalusia companies testified that the differential between the price of western pork and southern pork was narrowed when Swift & Company secured control of the stock and that they were required to maintain the new differential. (R. 1394–1395, 162, 475, 476.)

Retail dealers in Atlanta and Jacksonville had to pay higher prices for soft pork as compared with western pork after the acquisition by Swift & Company of the stock of Moultrie and Andalusia companies. (Rec. pp. 153, 438–439, 502–505.)

Branch-house price lists and weekly differential letters sent by Swift & Company to its branch houses also show a narrowing of the margin between soft pork and western pork, the differential on June 20, 1921, ranging from ½¢ to ¾¢ on fresh loins, 1¢ on skinned shoulders, and best grade southern hams 1¢ over second-grade western hams. (Rec. pp. 1488–1489.) The margin on these lists in the summer of 1921 averaged from ½¢ to 1½¢ (Rec. pp. 1488–1523) as against a differential before the acquisition of these companies of from 2 to 5 cents (supra, p. 8).

The brokers who had formerly sold the products of the companies began to find it increasingly dif-

ficult to procure sufficient products to supply their trade, and in October and November, 1917, relations with them were severed (R. 471, 473, 478, 481). (R. 307–309, 1424–1426.) Thereafter, the products of the two plants were sold through the branch houses of Swift & Company or by car routes and traveling salesmen traveling out from the two plants. Later on, sales from the Andalusia plant were entirely discontinued except as to products sold in Andalusia, and the entire selling organization was removed to the regular branch house of Swift & Company at Montgomery. (Rec. pp. 943, 1036.) Thus all competition which had existed between Swift & Company and the Moultrie and Andalusia companies, as well as all competition between the two last-named companies, was entirely wiped out, and soft pork renewed as a troublesome competitive product in this territory.

SUMMARY OF ARGUMENT

The first paragraph of Section 7 of the Clayton Act prohibits an operating company engaged in interstate commerce from acquiring the share capital of another operating company where the effect may be to substantially lessen competition between them. The second paragraph applies to pure holding companies and prohibits such corporations from acquiring the share capital of two or more corporations where the effect may be to substantially lessen competition between any of the

corporations. A fair review of the committee reports and debates shows that the first paragraph of the Section was not directed only against secret acquisitions of stock or that the second paragraph only applies to holding companies secretly controlling competing companies. A bogus independent is used to restrict competition between the parent company and its competitors, not between the parent company and the bogus. The prohibition, therefore, against lessening competition between the two companies is not applicable to bogus companies.

At the time of the passage of the Act holding companies which restrained trade or threatened a monopoly were prohibited by the Sherman Law (*Northern Securities case*). Section 7 was intended to reach restraints of trade and monopolies in their incipiency and before they had grown to such proportions as to violate the Sherman Law. To accomplish this the statute prohibits intercorporate purchases of stock which may substantially lessen competition between the corporations.

The statute does not regulate manufacture or the ownership of property, but is a direct regulation of competition in interstate commerce. That the restraint imposed upon competition by the control of stock of competing corporations is a direct restraint upon competition has been recognized since the *Northern Securities case*. Therefore, Congress in passing the Clayton Act exercised its power directly to regulate interstate commerce and

not its power to protect that commerce from acts arising de hors the body of commerce itself.

In prohibiting the purchase of stock where the effect may be to lessen competition between the corporations the Act does not impose an undue limitation upon the liberty of corporations to contract. It restricts this liberty at the point where it threatens the public welfare by the elimination of competition. Petitioner has not discharged the burden of showing that the Act is not reasonably calculated to preserve freedom of competition, or that it unduly limits the rights of corporations.

The statute as construed by the Commission does not confer upon it jurisdiction over the ownership of property. The Act authorizes the removal of a direct restraint upon competition by requiring the sale of the stock purchased, together with the rights which such stock represented. To authorize the Commission to require such divestiture is to touch manufacture or property rights only as an incident to the divestiture of share capital. This remedy has been invoked under the Sherman Law and the Statute has not been held for this reason to be a regulation of manufacture.

As construed by the Commission the statute does not prohibit a corporation from openly purchasing the properties, assets, and going business of a competitor while leaving natural persons free to do so. Where stock has been illegally acquired and the Commission proceeds, the gist of the offense is the acquisition of stock with the prohibited ef-

fect. This is true even where the acquiring corporation subsequently transfers to itself the properties and assets of the acquired corporation. The wrong is still the illegal acquisition of stock. The only question, therefore, of discrimination between persons and corporations under the statute arises from the prohibition against corporations acquiring the stock in competing corporations and the absence of prohibition against natural persons acquiring stock in competing corporations. Experience had disclosed that restrictions of competition through ownership of stock in competing corporations were effected by corporations not by natural persons. The discrimination made by Congress in this respect is reasonable and based upon differences which bear a reasonable and just relation to the end sought to be attained.

There is no unconstitutional delegation of judicial power with respect to physical properties. Petitioner appears to admit the constitutionality of the statute as applied to divestiture of stock. If this jurisdiction may be constitutionally conferred, the authority to compel divestiture of the properties is also valid.

ARGUMENT

I

The prohibitions of Section 7 of the Clayton Act are not limited to holding companies which operate subsidiaries as "bogus independents"

Counsel for Petitioner at pages 26 to 28 of their brief seek to establish that the first two paragraphs

of Section 7 of the Clayton Act do not prohibit one corporation from purchasing stock in another where the effect may be to substantially lessen competition between them, but prohibit only the creation of holding companies which operate the corporations whose stock is held as "bogus independents," i. e., under the representation that they do not own or control them. To establish this counsel seek to show (1) that "bogus independents" were referred to in the opinion of this Court in the *Standard Oil Case* (though they fail to notice that the decree in that case makes no reference to the employment of such methods but dissolved the holding company which was not secret but known to all the world); (2) that the Senate Committee report on the bill makes it clear that *holding* companies were intended to be prohibited by the Act; and (3) that in one part of his speech on the bill Senator Cummins states that a corporation ought not to be permitted to purchase the stock of competing companies and continue to operate them under the old name so that the public is not advised of the purchase. In other words, counsel seek first to establish that there had been before the passage of the Act such a practice as the operation of bogus independents, drawing this conclusion from sources outside of the Act or the Committee reports; second, that the Committee report discloses that the Act was intended to prohibit holding companies, and then, without establishing any connection between the two matters they conclude that only a

prohibition of holding companies which operate the controlled companies as bogus independents was intended to be reached. We respectfully submit that the conclusion is not justified.

On this point of construction we submit:

1. The wording of Paragraphs 1 and 2 of Section 7 do not contain a word or phrase which can be construed into meaning that only secret acquisitions of stock by one corporation in another are prohibited, and counsel for Swift & Company have failed to point to any ambiguity in its wording. Where the statute is plain on its face, there is no reason for resorting to construction.

2. If, however, resort to Committee reports and debates be had to show the history of the times and the mischief to be remedied, the result does not show that the intent of Congress was to prohibit only the secret ownership of the stock of competitors and the holding out of these corporations as independent. Doubtless one of the causes which moved Congress to enact the section was the fact that the control of one or more corporations by another was sometimes secret. But there were other and more weighty reasons. The desire of Congress went much deeper than this and sought to prohibit the holding of stock between competing corporations.

It will be seen that the excerpts from Committee reports reproduced in Petitioner's brief do not contain the suggestion that the bill was aimed at secret acquisition and holding of stock. That

suggestion, and it is only a suggestion, is found in the statement of a single Senator. True the Committee reports repeatedly assert that the purpose was to reach "holding companies," but the holding company did not ordinarily conceal its ownership of stocks in other companies. Combinations in this form were notorious. Senator Reed of Missouri, who was prominent in the debate on the measure, said:

> Mr. President, an open and public consolidation does not help us a bit. We want to stop trusts and monopolies. We must not undertake to do it by publicity. The monopolist to-day does not hide his light under a bushel. He does not proceed in secret. He comes boldly to the front. He creates his monopoly and declares that he has a monopoly and sells his stock on the strength of it. That is, in effect, true. The statement may seem a little exaggerated, but take the steel trust. Did they conceal at all the fact that they were undertaking to create a gigantic monopoly? (Cong. Rec. Aug. 27, 1914, p. 14316.)

Various statements of Senators prominent in the debate show that acquisition by one corporation of stock in competing corporations was intended to be prohibited and no limitation that the acquisition should be secret or continue secret is found.

Senator Cummins said:

> I know the Senator meant to be fair, but we are talking now about one corporation holding the stock of another. I say it ought

not to be permitted at all, but we can not go that far; we ought, however, to prevent one corporation holding the stock of another, the two being engaged in a competitive business. There may be some reason why that principle can not be carried out in its fullness in the case of common carriers. I am not considering them now; but there is no suggestion that I have ever heard that would prevent the principle from having its full and complete application not only with regard to existing corporations but with regard to all future corporations, so far as ordinary commerce and industry are concerned. It is a sound, wise policy for any country to adopt and maintain. That is the policy, I think, intended to be announced in the section. * * * We ought to go one step further back and say that, inasmuch as we know that the ownership by a corporation engaged in commerce of the stock of another corporation engaged in commerce does tend to eliminate competition and does tend to destroy the rivalry that should exist, therefore, when that one fact is shown—namely, that the two corporations are or ought to be competitive with each other—the stockholding becomes unlawful, without requiring any further inquiry or investigation. (Cong. Rec. Aug. 25–26, 1914, p. 14255.) * * * I believe we ought to take the high, defensible ground that two corporations engaged in the same kind of business must be independent, and that one must not hold the stock of another. We all know that whether the stockholding is large or small propor-

> tionately, it must influence the motives of the managers of the corporations. The stock is not acquired usually for any other purpose than to control or influence or direct the affairs of the corporation whose stock is thus acquired. (Cong. Rec. July 2, 1914, p. 11531.)

Again, in a colloquy between Senators Cummins and Reed, the following occurs:

> Senator CUMMINS. I know the Senator from Missouri certainly does not believe that the antitrust law forbids under all circumstances one business man from buying the business of another. That can not be true.
>
> Senator REED. No; but I undertake to say that the law ought to be that one corporation can not acquire the stock of another corporation and thus remove the competition between the two institutions.
>
> Senator CUMMINS. I agree with that. That ought to be our policy. (Cong. Rec. Aug. 27, 1914, p. 14316.)

3. The single utterance of Senator Cummins quoted at page 37 of the Petitioner's brief to the effect that acquisitions by a corporation of stock in a competing corporation ought to be disclosed, and a definition of "holding companies" by a writer on economic subjects are the sole support which Petitioner produces for its contention that Section 7 prohibits only secret acquisitions and the operation of the acquired companies as "bogus independents." In view of other statements of Senator Cummins and of other Senators above quoted and

those which follow (infra. pp. 27–28), it is submitted that this single statement does not show that Senator Cummins thought that the proposed measure reached only such acquisitions. The definition of holding companies has no weight whatever. It is submitted that the plain wording of the statute may not be changed by these considerations.

The whole argument that the Section was aimed at holding companies which operate the corporations controlled as "bogus independents" is inconsistent with the declaration that the ownership of the stock shall be unlawful if the effect may be to substantially lessen competition *between* the companies. "Bogus independent" companies are employed to lessen competition between the parent company and its competitors—not between the parent company and the secretly owned "bogus" company. Furthermore, such authority as there is on the subject holds that in order to amount to the operation of a "bogus independent" either the "parent company" or the "bogus company" must affirmatively hold the "bogus" out as independent. Mere failure to disclose the ownership or control of the "bogus" is not sufficient. (*U. S.* v. *International Harvester Co.*, 214 Fed. 987, 992.) Section 7 would not reach the operation of a "bogus independent" even if it be construed as prohibiting secret acquisition of stock, since it clearly does not provide that the "bogus" company shall affirmatively be held out as independent.

The conference ruling and the excerpt from Commissioner Murdock's testimony on pages 42–43 of petitioner's brief do not refer to acquisition of stock in violation of law followed by transfers of properties, as the language clearly shows, but to direct acquisitions of properties. We do not contend, of course, that "the mere purchased properties" violate the Clayton Act.

II

The section reaches substantial lessening of competition between two or more corporations by stock ownership and does not operate to prohibit only those undue restraints of trade prohibited by the Sherman law

In points (b) and (c), pages 38 to 43 of Petitioner's brief, counsel contend that the first two paragraphs of Section 7 do not prohibit acquisitions by corporations of the stock of competing corporations where the effect may be to lessen competition between such corporations, but that they prohibit such acquisitions only where the effect is substantially, directly, and injuriously to affect interstate commerce. It is not clear whether counsel mean that competition between the corporations must be substantial, and, if so, and it is eliminated, that there is a violation of the statute; or whether they mean that the business of the corporations must be so extensive that their combination by way of a holding company would amount to a restraint of trade or a monopoly within the meaning of the Sherman Act.

To support their position, however, counsel quote from various decisions under the Sherman law so that it may reasonably be inferred that the same test of legality is to be applied under this section as under the Sherman Act. If this be their position it is unsound. The purchase of stock by one corporation in one or more competing corporations if it result in restraint of trade had been unlawful ever since the decision of this Court in the *Northern Securities case*. (*Northern Securities Company* v. *U. S.*, 193 U. S. 327.) It would have been perfectly useless therefore for Congress to reenact a statute to make acquisitions of this character unlawful.

> If it was not intended to change the law from what it was under the then existing act, its enactment was meaningless and a vain thing, a presumption Courts will not indulge in when construing legislative acts. *United States* v. *United Shoe Machinery Co.*, 264 Fed. 138, 162, citing *Wis. Central R. R. Co.* v. *United States*, 164 U. S. 190, 202.

This Court in the *Magrane-Houston case* (*Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356) and in the *United Shoe Machinery case* (258 U. S. 451, 459, 460) clearly held that the Clayton Act sought to reach restraints of trade in their incipiency and to determine their legality by a different test than that of the Sherman Law.

It is submitted that the clause

> Where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so

> acquired and the corporation making the acquisition,

and the clause

> Where the effect of such acquisition, or the use of such stock by the voting or granting of proxies, or otherwise, may be to substantially lessen competition between such corporations or any of them,

do not contain a word of doubtful meaning, nor could they be so arranged as to make their meaning more definite and unambiguous. If, however, resort to debates be had to show the history of the times and the legislative intent, it becomes clear that the intention of Congress was to say exactly what it did say. Senator Cummins, not long before the close of the debates on the measure, said:

> However it is expressed it is the mere fact of competition that ought to decide the whole situation. If the corporations are competitors, if they are engaged in the same kind of business, there ought not to be between them any such community as is created by one of them holding stock of the other. (Cong. Rec. Aug. 26, 1914, p. 14256.)

Senator Poindexter said:

> The proposition here, as I undertook to say before, is an entirely different one from the rule laid down by the Court in the Sherman antitrust Act. Here it is proposed to specify it, namely, the corporate ownership of stock in two competing corporations by the same holding company. (Cong. Rec. Aug. 27, 1914, p. 14317.)

Senator Smith of Georgia said:

> Mr. President, I only wish to say in voting for the committee amendment that this prohibition is one against conduct that eliminates or substantially lessens competition between the corporation whose stock is acquired and the corporation making the acquisition. (Cong. Rec. August. 27, 1914, p. 14318.)

The words "the substantial lessening of competition" in the third paragraph of the section do not change the clear prohibition of the first two paragraphs. This phrase can not, under any principle of statutory construction, be construed as demonstrating that where Congress has in the first two paragraphs of the section said "substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition," and "substantially lessen competition between such corporation or any of them," it meant to use the more general terms "substantially lessen competition." The first two paragraphs contain the prohibitive law. The third paragraph is permissive and provides that stock may be purchased in competing corporations for investment purposes, provided it is not used to bring about, or in attempting to bring about "*the* substantial lessening of competition." The definite article "the" in the last quoted clause clearly refers to something already mentioned, i. e., the language of the two

preceding paragraphs of the section, which is unmistakably specific.

The third paragraph must be read in the light of the first two paragraphs. So read it merely excepts from the operation of these two paragraphs acquisitions by one corporation of stock in another where the ownership of such stock is not used in such way as to violate the provisions of the first two paragraphs. The debates on the Act indicate that one of the purposes of the third paragraph was to permit insurance companies, trust companies, and similar institutions to invest in the stocks of competing corporations engaged in interstate commerce, provided that the stock so purchased were not used to bring about the lessening of competition between the companies whose stock was owned.

It is clear that the statute was intended to prohibit acquisition by one corporation of stock in a competing corporation where the acquisition substantially lessened competition between them.

III

The section is an exercise by Congress of its powers directly to regulate interstate commerce itself and not of its power to protect interstate commerce from burdens arising de hors the body of such commerce

Under Point II counsel for petitioner contend that the ownership of stock is not commerce nor an instrumentality of commerce and can not be regulated by Congress. To this we say that the purchase

by one corporation of the share capital of a competing corporation or corporations and its use of such stock to lessen competition between them in their business in interstate commerce is a part of commerce itself. The subject matter regulated is competition in interstate commerce, and the regulation is one dealing as directly with commerce as does the statute prohibiting the misbranding of goods shipped in interstate commerce or the monopolizing of interstate commerce by the merger of companies engaged in interstate commerce. Where competing companies engaged in interstate commerce combine by way of stock ownership, the effect upon competition in interstate commerce is direct and immediate. In the Clayton Act Congress exercises its power directly to regulate interstate commerce and not its power to protect that commerce from burdens or restraints arising de hors the body of commerce as it did in the act penalizing the use of fraudulent bills of lading (*United States* v. *Ferger*, 250 U. S. 199) and similar statutes. This has been recognized since the decision of this court in *Northern Securities Companies, supra*, and has been reaffirmed in the *Standard Oil, American Tobacco,* and other decisions.

In cases arising under the Sherman Act it has been consistently held that in order to vitiate such a combination it is essential to show only that by its necessary operation it tends to restrain interstate or international commerce. (*Addyston Pipe Company* v. *United States*, 175 U. S. 211; *United*

States v. *Knight Company*, 156 U. S. 1.) In the *Union Pacific case* (*United States* v. *Union Pacific R. R. Co. case*, 226 U. S. 61) the purchase by one railroad company of the controlling interest in the stock of another—not the creation of a holding company or the use of a bogus independent—was held to be illegal under the Act even though only three and one-tenths per cent of the tonnage of the Union Pacific and eighty-eight one-hundredths of one per cent of the tonnage of the Southern Pacific was competitive.

Thus far have Congress and the courts gone, under the Sherman Law, to regulate intercorporate holding of stock of corporations engaged in interstate commerce. Counsel for respondents appear to contend that Congress can not go farther and prohibit one corporation engaged in interstate commerce from acquiring the stock in another where the effect may be to substantially lessen competition between the companies. But we submit that the question of competition in interstate commerce is one over which Congress has plenary jurisdiction. It clearly appears that Congress was of opinion that it had not gone far enough in its prohibitions against the elimination of competition in interstate commerce by the purchase by one corporation of the share capital of competing corporations, but that it should go further along this line of regulation. Was it not competent for Congress so to regulate this subject matter as to prevent the creation of conditions which called for the

application of the Sherman Law? The decisions of this Court in *Standard Fashion Company* v. *Magrane-Houseon* and in the *United Shoe Machinery case* establish that Congress can at least go farther than it did in the Sherman Law. The legal basis of the right to proceed further in the regulation of competition has been so aptly stated by the court below that we venture to quote its language here:

> Must Congress act only when the child has grown to the stature of a giant? If authority exists to curb—or to dissolve—a corporation when it has reached the trust stage, may Congress not take steps to arrest the corporation's growth before the final stage has been reached? * * * The Government may, under the commerce clause of the Constitution, forbid every contract "which is reasonably calculated to injuriously affect the public interest." *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S., 202. It may act to anticipate or prevent an unfortunate situation as well as deal with the one that existed.
>
> As before stated, the Clayton Act supplemented the Sherman law, the practical enforcement of which was found difficult and often resulted in hardships to innocent parties. The section under consideration sought by means, which the Congress deemed expedient and effective, to prevent a condition which the Sherman law was designed to overcome when once it existed. Certainly courts should hesitate to say that the means se-

lected are not "appropriate" or "primarily adapted" to accomplish the desired end when it is conceded that the prevention of such "ends" through dissolution is within the recognized powers of Congress.

In other words, the issue is not one of authority of Congress to deal with an undesirable condition, but rather an asserted want of power to prevent that result through the means resorted to for that purpose. And the answer seems to be that Congress, having the authority to regulate interstate commerce, may do so by such means as to it seems appropriate to prevent a condition which is contrary to the settled public policy of the Government and inimical to the welfare of its people. (R. 1609.)

IV

The act is not an undue limitation upon the liberty of corporations to contract

In the *Northern Securities case, supra*, Mr. Justice Harlan says that—

> The Constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in interstate and international commerce. * * * But this court has heretofore adjudged * * * that liberty of contract did not involve a right to deprive the public of the advantages of free competition in trade and commerce. Liberty of contract does not imply liberty in the corporation or individual to defy the national

> will when legally expressed. Nor does the enforcement of a legal enactment of Congress infringe in any proper sense the general inherent right of everyone to acquire and hold property. That right, like all other rights, must be exercised in subordination to the law.

And in *Erie* v. *Williams* (233 U. S. 685), this court said:

> But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—can not be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public.

The act making the initial carrier liable for damage to property in transportation (*Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186), and the Federal Employers' Liability Act, impose a much more direct and substantial burden upon the liberty of corporations to contract with respect to their own business than does Section 7 of the Clayton Act. (See also *United States* v. *Knight, supra; United States* v. *American Tobacco Co.*, 221 U. S. 106.)

This court also holds that—

> The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be

> sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. The legislature is in the first instance the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. * * * Its judgment will not be reviewed "unless unmistakably and palpably in excess of legislative power." (*Erie* v. *Williams, supra.*)

We submit that the petitioner has failed to demonstrate that the act is not reasonably calculated to preserve freedom of competition in interstate commerce, or that it unduly limits the rights of corporations.

V

The act as construed by the Commission does not confer jurisdiction over manufacture or the ownership of property

Counsel for the petitioner next make the point that manufacture is not commerce, and contend, as we understand their brief, that because the Commission's order requires the divestiture of the stock of the Moultrie and Andalusia companies, together with the properties and assets of those companies, there is an attempted regulation of manufacturing operations and of property. This we respectfully submit is not correct. Congress may require that restraints on competition in interstate commerce be removed, and if such restraints can be removed

only by the sale or disposition by the parties of stock in corporations or of properties, this may be constitutionally required.

It is settled law that where properties are purchased as a part of a plan to monopolize or to restrain interstate trade the combination or monopoly may be dissolved by compelling such purchasers to sell the properties acquired for an illegal purpose. This has been established since the decree in the case of *U. S.* v. *American Tobacco Company.* In order to dissolve that combination new corporations were organized, to which plants and properties formerly owned or controlled by the combination were transferred and competing companies in various lines thus created. (Decrees and Judgments in *Federal Anti-Trust cases,* Government Printing Office, August 26, 1918, pp. 165–191.) In *U. S.* v. *International Harvester Company* (214 Fed. 987), where the illegal combination had been formed through the consolidation of the physical properties and good will of the principal competing harvester companies, the decree required "that the business and assets of the International Harvester Co. be divided in such manner and into such number of parts of separate and distinct ownership as may be necessary to restore competitive conditions." (Judgments and Decrees in *Federal Anti-Trust cases,* p. 340.) Similar disposals of share capital or other property have been decreed in other cases. (*United States* v. *Reading Co.,* 253 U. S. 26; *Con-*

tinental Insurance Co. v. United States, Reading Co. et al., 259 U. S. 156.)

While the Sherman Act is therefore construed as reaching stock and properties, Congress in passing it was not regulating the ownership of property or of manufacturing operations. The disposition of the properties is a necessary incident to the restoration of competitive conditions, the only effective means of removing the restraint upon competition.

In the instant case the Commission does not claim that Congress in the Clayton Act has conferred upon it or upon the courts power to regulate the ownership or disposition of property or to regulate manufacture. We do claim that an order to dispose of the stock acquired may carry with it a requirement to dispose of the assets and properties which the stock represents. This question has been discussed in the Respondent's brief in the *Thatcher case* and will not be enlarged upon here.

VI

The act does not discriminate between corporations and natural persons in such manner as to deprive corporations of liberty or property without due process of law

Having sought to establish that the statute applies to and covers "only situations wherein the facts, judicially ascertained and determined, show that corporate ownership of stock is so postured as to create a direct and substantial obstruction in the current of interstate commerce and which obstruc-

tion will be removed from such interstate current by change in the ownership of such stock" (Petitioner's brief, p. 23), petitioner contends that the construction given to the act by the Commission would raise the following questions:

> 1. May Congress prohibit a property owner from selling his property and going business to a competitor, merely because the effect of such sale "may be to substantially lessen competition between" the seller and the buyer?
>
> 2. If this question should be answered in the affirmative, then may Congress forbid a corporation from openly acquiring the property and going business of a corporate competitor, under circumstances wherein the transaction would be inoffensive to the law if seller or buyer, or both, were individuals—the respective positions in the trade, and the instrumentalities used in commerce of the respective corporate and individual vendors and vendees being precisely the same? In other words, may the law forbid to corporations, solely because they are corporations, what it permits to individuals in identical circumstances?

It is submitted that no such question as that presented by these two paragraphs can be predicated on the statute or on any construction placed upon it by the Commission as disclosed by the record in this case.

The statute prohibits the purchase by one corporation engaged in interstate commerce of the

share capital of a competing corporation, etc., where the effect may be to substantially lessen competition between two or more companies. The Act is directed at the purchase of stock. It leaves individuals free to purchase stock in two or more corporations. It leaves corporations free to purchase stock in other corporations where the effect is not to substantially lessen competition between them. It leaves corporations free to purchase the assets, properties, and business as going concerns of other corporations to the extinction of competition between them, if nothing else appears than a purchase of properties.

But a corporation may not purchase the stock of a competitor or competitors, assume control and direction of the corporation in such manner as to eliminate competition, and then, through the use of the stock purchased, convey to itself the properties, assets, and good will of the corporations. The fact that the acquiring company has been able to take over the properties before a complaint can be filed by the Commission and a hearing had does not deprive the Commission of jurisdiction over the violation of law. In such a case, as where the properties have not been transferred, the gist of the Commission's case is the illegal acquisition of the share capital and the remedy is divestiture. An order to sell the stock in such manner that when sold it shall carry with it properties, good will, and other assets as a going concern is within a complaint charging an illegal acquisition of stock.

Petitioner can not by the transfer of properties after purchase of stock distort the statute or place the Commission in the false position of assuming jurisdiction over mere acquisitions of property by a corporation, or of seeking to prevent a corporation from openly buying the property and going business of a competitor.

We submit, therefore, that while a question of deprivation of liberty or property without due process of law may be predicated on the statute and on the record in this case, it is not the question as stated by counsel for petitioner. The question, we submit, should be reframed and as so reframed be stated in substance as follows:

May Congress, without violating the due process clause of the Federal constitution, forbid corporations to purchase stock in competing corporations where the effect may be to substantially lessen competition between such corporations, while not prohibiting natural persons from acquiring the stocks in corporations competing in such commerce? May Congress constitutionally prohibit to corporations in this respect what it permits natural persons to do? The point which would be here raised is, "Has Congress in framing the prohibitions of the statute so discriminated between corporations and natural persons as to deprive the former of liberty or property without due process of law?" If its selection of corporations as a class to which the law should be applied was reasonable and based upon some difference which bears a reasonable and

just relation to the end sought to be attained, its action is constitutional.

The bases for classification which will avoid constitutional objection on the score of undue discrimination are covered by the following general principles which have been outlined by decisions of this Court:

> 1. The statute may not constitutionally discriminate substantially between those who are similarly situated with reference to the regulation and its consequences. (*Tegola* v. *Hawaii*, 226 U. S. 184.) The legislature should take into account varying conditions in the respective localities affected by the Act. (*Id.* p. 191.)
>
> 2. If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the 14th Amendment allows it to be dealt with, although otherwise merely logically not distinguishable from others not embraced in the law. (*Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160, 161.)
>
> 3. The discretion granted to the legislative power is very wide. (*Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 235.)
>
> 4. It is not necessary that the classification be the best one possible. (*Heath & Milligan Mfg. Co.* v. *Worst*, 207 U. S. 338, 354, 355.)

The classification here consists in the application of Section 7 exclusively to corporations and the omission from the prohibition of firms and individuals who may be engaged in commerce and whose

purchases of stock might in theory substantially lessen competition between the corporations. Such classification between corporations and individuals is not an arbitrary one or without foundation both in law and in fact.

It is submitted that a classification which places corporations in a different class with natural persons with respect to the purchase of stock in other corporations is not an arbitrary classification. At the common law in many of the states corporations could not purchase stock in other corporations, though there were no such limitations on the right of natural persons to purchase stock in one or more corporations. Vice Chancellor Stevenson in *Robotham* v. *Prudential Ins. Co.* (64 N. J. Eq. 673, 851) summarizes the state of the common law on this subject, as follows:

> There is authority for the proposition that corporations are under no disability at common law to purchase and hold the stock of other corporations. In re *Barned's Banking Co.*, 3 Ch. App. 105, 113; *Royal Bank of India's case*, 4 Ch. App. 252, 257; *Booth* v. *Robinson*, 55 Md. 419; *Davis* v. *Light Co.*, 77 Md. 35, 25 Atl. 982. There is also authority for the proposition that corporations can not acquire and hold the stock of other corporations without express authorization under a statute; the origin of the prohibition, whether in the doctrine of ultra vires or in some positive rule of law based on public policy, being often left in uncertainty. See

Noyes, Inter. Corp. Rel. pp. 264, 265; 1 Cook, Corp. Par. 315; 1 Thomp. Corp. Par. 1102; 7 Thomp. Corp. Par. 8353, 8354; 7 Am. & Eng. Enc. Law, pp. 810–816, and cases cited. There are also dicta, at least, sustaining the proposition that corporations are prohibited by a general rule of positive law, based on public policy, entirely distinct from the doctrine of ultra vires, from purchasing stock in other corporations. *Oelbermann* v. *Railroad Co.*, 77 Hun. 332, 335, 29 N. Y. Supp. 545; *Franklyn Bank of Cincinnati* v. *Commercial Bank of Cincinnati*, 36 Ohio St. 350, 38 Am. Rep. 594; *Franklyn Co.* v. *Lewiston Inst. for Savings*, 68 Me. 43, 56, 28 Am. Rep. 9. There is also authority for the proposition that a rule of law based on public policy or on the doctrine of ultra vires, or on both, prohibits a corporation from acquiring the stock of another corporation where the business of one or both corporations has certain characteristics, or where the purchase is made for certain purposes. 1 Cook, Corp. Par. 315; *Louisville & N. R. Co.* v. *Kentucky*, 161 U. S. 677, 698, 16 Sup. Ct. 714, 40 L. Ed. 849; *People* v. *Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319.

Swift & Company is organized under the law of Illinois. In *Dumbar* v. *Am. Telp. & Telg. Co.* (224 Ill. 9) it was held that a foreign corporation could not legally purchase a majority of the shares of stock of a competing Illinois corporation for the purpose of controlling the latter and thereby pre-

venting competition between the corporations. See also in this connection *Central Life Ins. Co.* v. *Smith*, 236 Fed. 170.

The Constitution of Georgia, under the laws of which the Moultrie Co. was organized (Par. 4, Sec. 2, Art. 4), provides:

> The General Assembly shall have no power to authorize any corporation to buy shares of stock in any other corporation in this state or elsewhere, or to make any contract or agreement whatever with any such corporation which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses or to encourage monopoly.

In *Hamilton* v. *Savannah F. & W. Ry. Co.* (49 Fed. 412) the court cites this section of the Georgia Constitution and says, "It has long been true that before one corporation can acquire the stock of another corporation there must be express authority given for it by the state. At common law there was no such power." See also *Georgia R. R. Co.* v. *Collins* (49 Ga. 582). In Alabama, where the Andalusia Co. is organized, the law is the same. (*Memphis & C. R. Co.* v. *Wood*, 7 So. Rep. 108; *Com. Fire Ins. Co.* v. *Board*, 99 Ala. 1, 11), and the same rule obtains in other jurisdictions unless modified by statute, and in the Federal Courts. (*De La Vergne* v. *German Savings Institution*, 175 U. S. 40; *Elkins* v. *Camden R. R. Co.*, 36 N. J. Eq. 5; *Pearson* v. *Concord Ry.*, 62 N. H. 537; *Marble Co.* v. *Harvey* 92 Tenn. 115.)

We respectfully submit that the restoration in a very limited measure of the rule of the common law as a regulation of interstate commerce, without applying the same rule to natural persons, was a proper exercise of legislative discretion. To limit the right of corporations engaged in commerce to purchase the stock of other corporations so engaged only where the corporations are competing and only where the acquisition may substantially lessen competition between the corporations, is not to "control the *mere* acquisition or the *mere* ownership of stock in a stated corporation," and the statement of Justice Harlan in the *Northern Securities case* (page 48 of petitioner's brief) has no application here. On this point Justice Brewer in his concurring opinion in that case said (p. 362):

> A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint on trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock.

The classification has abundant basis in fact, and the Act is so clearly adapted to accomplish the end desired—preservation of competition in interstate commerce—that the relation of the classification to that end would appear to be clear.

Persons engaging in interstate trade of any magnitude almost universally secure the advantages of the corporate form of organization. The history of litigation with respect to restraint of interstate commerce in this country probably does not show a case wherein a combination jeopardizing competition has been carried out by means of an individual as the owner of stock in various competing companies. "Corporations are the instrumentalities commonly used by those engaged in large enterprises. They lend themselves handily to activities of large proportions. Their control can be readily acquired." (Opinion below, R. 1608.) Such being the case, Congress did not include natural persons in the prohibition of the section. To have done so would have served no public interest and would have been idle.

The distinction made between natural persons and corporations in statutes regulating competition has been recognized by this court as valid in *Mallinckrodt* v. *St. Louis*, 238 U. S. 41. This court in upholding the validity of a Missouri statute said:

> It is insisted that to require an affidavit of innocence by the managing officers of corporations is an unjust discrimination against

them, and hence repugnant to the "equal protection" provision, because individuals, partnerships, and associations of individuals, although equally within the law against monopolies (Secs. 10299, 10303) are not required to make similar exculpatory affidavits. The question is whether, for the purpose of such a disclosure as is required by Section 10322, corporations may be placed in one class and individuals in another. The answer is not at all difficult. Of course, corporations may not arbitrarily be selected in order to be subjected to a burden to which individuals would as appropriately be subject. Classification must be reasonable; that is to say, it must be based upon some real and substantial distinction having a just relation to the legislative object in view. But here, as in other questions of alleged conflict with constitutional requirements, every reasonable intendment is in favor of the validity of the legislation under attack. Corporations, unlike individuals, derive their very right to exist from the laws of the State; they have perpetual succession; and they act only by agents, and often under circumstances where the agency is not manifest. The legislature may reasonably have concluded that, for these and other reasons, corporations are peculiarly apt instruments for establishing and effectuating those trusts and combinations against which the prohibition of the statute is directed, that their business affiliations are not so easily

> discovered and traced as those of individuals, and that there was therefore a peculiar necessity and fitness in annually requiring from each corporation a solemn assurance of its nonparticipation in the prohibited practices. The Act is, in this respect, fairly within the wide range of discretion that the States enjoy in the matter of classification. *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U. S. 642, 650, and cases cited.

In *Prudential Ins. Co.* v. *Cheek* (259 U. S. 530) this court again recognizes the propriety of imposing upon the corporations different obligations than are imposed upon individuals.

In *Central Lumber Co.* v. *S. Dak.* (226 U. S. 157, 161) this court upheld a state statute which prohibited any person from discriminating in prices of commodities sold as between different sections and communities, over the objection that the statute selected a class of dealers doing business at more than one place and imposed a burden upon them not imposed upon dealers having but one place of business and in favor of the latter. The court said:

> If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their State, and that there was no other case of frequent occurrence where the same could be said, we can not review their economies or their facts.

VII

There is in the statute no unconstitutional delegation of judicial powers

In its Subdivision III petitioner attributes to the Federal Trade Commission the claim that it has implied judicial power which petitioner declares without foundation. Respondent neither claims nor exercises judicial power within the meaning of the Constitution. In fact, petitioner itself refutes the charge it prefers when it insists that its interpretation of Sections 7 and 11 will save them from constitutional infirmity, and then proceeds to outline a construction which authorizes the Commission, under Section 11 to require divestiture of stock, after ascertainment of the necessary facts in accordance with the statutory method, which nowhere except on review invests the court with any jurisdiction whatever, and even then circumscribes it with the conclusiveness of respondent's findings if supported by testimony. There is no challenge of the power of the Commission to remove by order the condition proclaimed by Congress to be an obstruction to the channels of interstate commerce.

The Constitution provides no greater protection and no more inviolable right in the ownership of physical property than in that of stock, which often evidences ownership of vast aggregations of wealth in all forms of property. Acknowledgment that an order to divest the one is constitutional is equivalent to the admission that inclusion of physical

property in the order involves no exercise of judicial power within the meaning of the Constitution. Administrative duties may and often do involve the exercise of power essentially judicial in its nature but in no sense judicial power of the United States, which Congress may neither exercise nor delegate.

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be affirmed.

BAYARD T. HAINER,
Chief Counsel,
Federal Trade Commission,
ADRIEN F. BUSICK,
Assistant Chief Counsel,
Attorneys for Respondent.

○